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REPORTS
OF
CASES
HEARD AND DECIDED IN THE
HOUSE OF LORDS
ON
APPEALS AND WRITS OF ERROR,
AND
CLAIMS OF PEERAGE,
DURING THE SESSIONS
1837 & 1838.

By **C. CLARK AND W. FINNELLY, Esqrs.**
BARRISTERS AT LAW.

VOL. V.

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1841.



CHIEF JUDGES AND LAW OFFICERS
DURING THE PERIOD OF THESE REPORTS

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Master of the Rolls :

L O R D L A N G D A L E .

Vice Chancellor :

S I R L A U N C E L O T S H A D W E L L .

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L O R D D E N M A N .

Lord Chief Justice of the Court of Common Pleas :

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ERRATA.

Page 24, line 15, in the head note, *for* “held by witness” *read* “held by a witness.”

Page 99, first line of head note, *for* “trust deed of settlement” *read* “trust disposition and settlement.”

Page 154, line 8, from bottom, *after* “having” *insert* “it.”

Page 157, *for* “Appeal” at the top, *read* “Writ of Error.”

Page 161, line 5, from top, *after* “into” *insert* “it.”

Page 299, last line, *for* “narration” *read* “narrative.”

Page 380, *add as a second head note*, “Costs are not given where an interlocutor is only varied.”

Page 397, line 6, from bottom, *for* “This an order” *read* “This is an order.”

REPORTS OF CASES

HEARD IN THE

HOUSE OF LORDS,

ON APPEALS AND WRITS OF ERROR.

A P P E A L

FROM THE COURT OF SESSION.

1837.

April 21. 28.
May 3. 26.

Sir WILLIAM HENRY DON, of NEWTON, } *Appellant.*
Baronet - - - - - }

M. LIPPMANN, residing at NANCY, in } *Respondent.*
FRANCE - - - - - }

The law of a country, where a contract is to be enforced,
must govern the enforcement of such contract.

*Foreign
Judgment.
Bills of
Exchange.*

Where, therefore, bills were drawn and accepted, and became
due in France, but the acceptor, a Scotchman, before such
bills became due, returned to Scotland, and there con-
tinued till his death—HELD, by the Lords, (reversing the
decision of the Court of Session,) that more than six years
having elapsed between the time of the bills becoming due
and the action being brought, the Scotch law of prescrip-
tion applied, and that its effect was not prevented by the
fact that the payee had taken legal proceedings in France
during the absence of the debtor, and had obtained judg-
ment against him.

A Court which is called on to enforce a foreign judgment
may examine into that judgment to see whether it has been
rightfully obtained or not.

THE late Sir Alexander Don, the father of the Ap-
pellant, happened to be within the French territory

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in 1802, when hostilities recommenced between this country and France after the peace of Amiens, and with many other British subjects was tyrannically detained in France. He remained a prisoner until February 1810. Upon the 13th of November 1809, Charles Fagan, merchant in Paris, drew two bills upon him, which are dated "Versailles," ordering him, as acceptor, to pay to the Respondent Lippmann, who was named in the bills as payee, the sum of 20,000 francs, each bill being for that amount. These bills were drawn upon the acceptor at the "Hotel de Richelieu, Paris," his place of residence; were made payable on the 1st of March; and were drawn and accepted in the following terms:—

Versailles le 13 9bre 1809.

Bon pour 20,000 fr.

Au premier Mars prochain, payé par cette première de change, à l'ordre de M. Lippmann, le somme de vingt mille francs, valeur reçu, sans autre avis.

Bon pour vingt mille francs.

(signed) *Chas. Fagan.*

A Monsieur,
 Monsr. Don.

Hotel Richelieu, Rue Neuve,
 St. Augustin, Paris.

Accepté pour le somme de vingt mille francs, payable le premier Mars 1810.

(signed) *Alexander Don.*

Versailles le 13 9bre 1809.

Bon pour 20,000 fr.

Au premier Mars prochain, payé par cette première de change, à l'ordre de M. Lippmann, le

somme de vingt mille francs, valeur reçu, sans autre avis.

Bon pour vingt mille francs.
(signed) *Chas. Fagan.*

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A Monsieur,
Monsr. Don.

Hotel Richelieu, Rue Neuve,
St. Augustin, Paris.

Accepté pour le somme de vingt mille francs, payable le premier Mars 1810.

(signed) *Alexander Don.*

Before the bills became due, Sir Alexander Don left Paris, and was in England in the month of February 1810. When the bills became due they were dishonoured, and protested for non-payment against the acceptor, and the dishonour was intimated to Charles Fagan, the drawer.

M. Lippmann then commenced proceedings according to the law of France, against both the acceptor and drawer of the bills, and, in the action raised before the Tribunal de Commerce of the department of the Seine, Charles Fagan, the drawer, made appearance, but he did not deny the validity of the debt. He requested the Court, however, to give him time, in order that he might arrange as to payments of the bills. On the 25th July 1810, judgment was pronounced against both the drawer who had made appearance, and against Sir Alexander Don the acceptor in absence. All the requisites of the law of France were stated to have been complied with in these proceedings. The decree of the Court was for payment of the contents of the bills, and fifty-nine francs of expenses, exclusive of the expense of registering the judgment. This judgment was, in the

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pleadings in the present suit, alleged to have been intimated on the 22d October 1810, by the proper officer, and according to legal form, at the former residence of Sir Alexander Don; and it was stated, that he had left the Hotel Richelieu about six months before, and was believed by the servants at the hotel to have gone to England. Execution then followed against the effects of Charles Fagan, as his person could not be found. That person afterwards died, and about the month of March 1813 his effects were sold at the instance of M. Lippmann, and the sale was reported by the auctioneer as having produced 434 francs, after deducting expenses, for which credit is given. A claim was made on Sir Alexander Don, but he positively declared that he had remitted to France ample funds to pay all his just debts, and after a correspondence on the subject, which took place in 1814, no further claim was made on Sir Alexander Don in his lifetime. He died in April 1820. The action, now the subject of appeal, was commenced on the 3d of April 1829, and it was founded both upon the bills and the judgment. The defendant, who, being an infant, appeared by his tutor, set up in defence the Act of 1772, by which it is declared, “ that no bill of exchange, &c. shall be of force in Scotland unless diligence shall be raised and executed, or action commenced thereon within six years from and after the terms at which the sums in the said bills shall become exigible.” The question therefore which was raised, was, whether the law of Scotland or that of France was applicable to the case. If the former, then the Act of 1772, which limits the right of suing to within six years after the bill, &c. becomes due, had taken effect, and the action was barred by prescription; if the latter, then the bar by prescription would take effect at five years from the

date of the instrument, unless proceedings were taken in a French court on such instrument, but if such proceedings were taken, then after judgment therein obtained, the prescription would not be a bar for thirty years after the date of the judgment, and consequently the decree in the French court might properly be made the ground of the present suit. When the case came before the Lord Ordinary, he took the opinions of French counsel on the law of France, and after having taken time for consideration, he pronounced an interlocutor repelling the plea of sexennial prescription, and finding that the defendant was entitled to be reponed against the judgment of the Tribunal of Commerce in France. He therefore appointed the parties to be further heard on the merits of the case. In a note appended to the interlocutor, his Lordship went fully into the question of the particular law by which a claim on bills of this sort was to be decided, and intimated that he looked upon the proceedings in France as merely sufficient to repel the plea of prescription, but not as sufficient to preclude the defender from answering the claim by going into the merits of the case. The Lords of the First Division of the Court of Session sustained this interlocutor.

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Sir *W. Follett* and Mr. *M. Smith* for the Appellant:—The law by which this case must be decided is that of the country where the remedy is sought to be enforced (*a*). The remedy here was sought to be enforced in Scotland. The bills too became due while the acceptor was domiciled in Scotland, and therefore by the law of Scotland were payable there. The

(*a*) Voet. De Statutis, lib. 1, tit. 4, part 2, s. 58. Huber de Conflictu Leg. Div. Ersk. B. III. tit. 7, s. 48.

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lex loci solutionis must therefore prevail over the *lex loci contractus*. The Scotch plea of prescription is consequently applicable to the suit, and forms a complete bar to it. If a French bill of exchange is sued on in England, it must be sued on according to the law of England, and then the English Statute of Limitations would form a bar to the demand, if the bill had been due for more than six years (b). *De la Vega v. Vianna* (c), *The British Linen Co. v. Drummond* (d). It is admitted that the law of the place where the contract is made, must be employed to expound the contract. But there is a manifest distinction between expounding and enforcing a contract. If this first proposition is established, then it follows that the prescription thus created by the law of the country where the remedy is sought to be enforced, cannot be prevented from taking effect but by something which that law itself admits to be sufficient to defeat the prescription. Now, that cannot be the case with the proceedings in the French court. Those proceedings were altogether such as neither the Scotch nor the English law would recognize. They were taken in the absence of Sir Alexander Don, in the courts of a country where he was at the time an alien enemy, where he would not have been permitted by the law of that country to appear and claim any civil rights, and where he had neither property to be attached, nor an appointed agent to be answerable for him. All the cases in which the decrees of foreign courts have been treated as *prima facie* evidence of the existence of a debt, have been those where the parties did appear or had full opportunity of appearing before the tribunal pronouncing the decree, or

(b) Chitty on Bills, 8 edit. 613. (c) 1 Barn. & Ad. 284.

(d) 10 Barn. & Cres. 903.

where they had property situated or agents residing within the jurisdiction: *Goddard v. Swinton* (e), *Edwards v. Prescott* (f). In the case of *Sinclair v. Fraser* (g), the Scotch courts did not carry out the doctrine of the above cited cases, but on appeal to the House of Lords, they were directed to review their decision, and make it conformable to the preceding authorities. The case of *Douglas v. Forrest* (h) is not opposed to this argument, for though the English courts there enforced a decree of the Scotch courts made against a party in his absence, the judgment expressly proceeded on the ground, that he had real property in the country, the tribunals of which had pronounced the decision, and that as his property was under the protection of the Scotch law, it must be held liable to the decrees of that law. In effect, therefore, *Douglas v. Forrest* adopted the principle of the decision in *Buchanan v. Rucker* (i). This last case distinctly settled that a decree obtained against a person who was not within a jurisdiction, and who had no property within it, could not be effectual for any purpose whatever. The Scotch courts have always recognised the principles laid down in these English cases, and it follows, therefore, that the proceedings in France, which were had behind the back of the party by a tribunal before which he could not appear, and in a country where he had no property, cannot be received as judicial notice of a claim so as to prevent the operation of the Statute of Limitations. The authority of Lord Kaimes is in favour of the Appellant, for he says in distinct terms (k), that it ought never to be a question “whether a foreign prescrip-

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(e) Morr. 4533.

(f) Id. 4535.

(g) Id. 4542.

(h) 4 Bing. 686.

(i) 1 Camp. 63 ; 9 East, 192.

(k) Principles of Equity,
 vol. ii. p. 353.

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tion or that of our own country ought to be the rule, for our own prescription must be the rule in every case that falls under it, and not the prescription of any other country." The same author, noticing the statute of 1579, which introduced the triennial prescription, observes, that it directs the Judges "not to sustain action after three years," without making any distinction as to the debt being Scotch or foreign. Lord Eskgrove put the same construction on the statute of 1772, in the case of *Della Valle v. The York Buildings Co.* (l). It is clear, therefore, on all the authorities, as well as on principle, that the prescription of a right of action on any obligation, must be regulated by the *lex fori* of the remedy, and not by the *lex loci contractus*. The decision of the Court below must consequently be reversed.

Dr. *Lushington* and Mr. *Gordon* for the Respondent:—The decision of the Court below was correct in admitting the proceedings in the French courts as a bar to the prescription. Both the drawer and acceptor of the bills were liable to the payee, and proceedings against one only would have been sufficient to affect both: *Gordon v. Bogle* (m). But here there were proceedings against both, and judgment was obtained against both according to the proper forms of the law of the country where those proceedings were had. But then it is said, that the *lex loci contractus* is not to decide a case of this sort where one of the parties is subject to another jurisdiction. That argument cannot be sustained. The parties making a contract, make it with reference to the law of the country in which it is made. They cannot anticipate that it is to be broken, and that it will have to be enforced in another country. At all events, they cannot be sup-

(l) March 9, 1786.

(m) Morr. 11127.

posed to make such an anticipation where the contract is for the simple payment of a sum of money. The French courts had jurisdiction in this case, because the contract was entered into in France, both the parties being resident there, and both expecting the contract to be performed there; and by the law of that country, it is not absolutely necessary that when the performance of such a contract is claimed, the foreigner who made it should actually be in France. Proceedings may, even in his absence, be taken to enforce performance of it. If therefore the French courts had jurisdiction over the matter, then it is a well established principle of law, that the judgments or decrees of foreign courts having competent jurisdiction, afford at all events *prima facie* evidence of a claim, and that effect will be given to them, unless they are impugned on the ground that the judgment given was contrary to the *jus gentium*, and consequently ought not to be respected in the courts of civilised nations. Nothing short of such an objection can be allowed to impugn the judgment. Indeed in *Geyer v. Aguilar* (n), the Court of King's Bench supported a decree of one of the French courts condemning an American vessel, although the Judges characterised the decree itself as having proceeded on principles more worthy of an Algerine court than that of any civilised nation, and as actually authorising an act of piracy. In the cases of *Goddard v. Swinton* (o), *Edwards v. Prescott* (p), *Johnston v. Crawford* (q), and *Findlater v. Drummond* (r), the jurisdiction of foreign courts was recognised in a matter where such courts had jurisdiction, and their judgments were enforced. Now, it is clear here that the courts had

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(n) 7 Term Rep. 681.

(o) Morr. 4533.

(p) Id. 4535.

(q) Morr. 4544.

(r) Brown's Syn. 707.

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jurisdiction, and that the *lex loci contractus* must govern the present case. In *Robinson v. Bland* (s), Lord Mansfield said, "The general rule established, *ex comitate et jure gentium*, is, that the law of the place where the contract is made, and not where an action may be brought, is to be considered in expounding the contract." With regard to a bill of exchange, the Scotch law holds that the place where the bill is made payable decides by what law the contract is to be governed: *Rogers v. Cathcart* (t), *Grove v. Gordon* (u), *Lord Lovat v. Lord Forbes* (x), *Parry v. M'Lachlan* (y), *Glyn v. Johnston* (z), *Phillips v. Stainfield* (a). The bills here were payable in France—they were drawn by a person residing in France upon another also residing there, and were accepted by him with his address in Paris affixed to the acceptance. Everything, therefore, showed the intention of the parties to treat these bills as French contracts. The limitation is of the very nature of the contract. The French law is consequently applicable to them. If so, then the proceedings in the French courts are a complete bar to the prescription. But it is said that they cannot be so, because they were taken in the absence of Sir Alexander Don. But *Douglas v. Forrest* (b) recognised the principle, that a judgment had in the absence of a party, was not on that account alone to be treated as invalid. There is here no other objection to the judgment, which was obtained in a regular suit against Sir A. Don and his co-surety, and the latter must for such a purpose be considered as the agent

(s) 1 Sir W. Black. 256. See also the arguments in the case, p. 234.

(t) Morr. 4507.

(u) Id. 4511.

(x) Id. 4513.

(y) 24 May 1827.

(z) 8 June 1830.

(a) Morr. 4503.

(b) 4 Bing. 686.

of the former. The judgment in the French Court must therefore be treated as a judicial recognition of the claim, sufficient to bar the prescription now set up from taking effect.

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Lord *Brougham* :—My Lords, there is a case of *Don v. Lippmann* which was recently argued before your Lordships, and which involving as it does a matter of national law, is one of considerable importance. The facts of the case are these. The late Sir Alexander Don was the acceptor of two bills of exchange, drawn on him by one Fagan, for the sum of 20,000 francs each, and payable on the 1st of March 1810, to Fagan's order. He accepted these bills in France, but soon afterwards returned to Scotland and died there, leaving the present Appellant an infant, who now appears with the concurrence of a tutor. This action was commenced in Scotland, in April 1829, by the payee of the bill against the Appellant as the representative of his father; the payee having previously, namely, in 1810, proceeded in the French courts against Fagan the drawer and Sir Alexander Don the acceptor, and obtained judgment there. In that proceeding Sir A. Don was not cited, except according to a form known in the French courts of judicature, by the affixing of notice in a public office. The payee then commenced this action both on the bills and on the judgment obtained in that proceeding in the French courts. The Appellant defended himself by setting up prescription under the Scotch Act of 1772. The Lord Ordinary, before whom the case came, after taking the opinions of French counsel for the purpose of informing the Court as to what was the French law, pronounced an interlocutor, repelling the defence of the Scotch limitation of six years, holding that the French judgment did operate

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as an interruption of the prescription, and was valid as an answer to that defence in this case, and as he held the French law to be valid for the purpose of interrupting the prescription, he allowed the judgment of the French court to enter into his consideration of the case, but did not hold it to be conclusive. He therefore reponed the defendant below, and allowed him to make out a defence in what manner he could on the merits. On this decision the case was brought before the Lords of the First Division of the Court of Session, and they affirmed the judgment of the Lord Ordinary. This appeal was then brought before your Lordships.

It appears that in Scotland,—and it is rather singular that it should be so,—where a bill is accepted payable generally, without any particular place being named, it shall be deemed payable at the place at which the acceptor is domiciled when it becomes due. It becomes of some importance to know where the bills were payable, because this principle, which has been adopted of late years in many of the Scotch decisions, and towards which I admit the great leaning of the Scotch profession is, renders it material to consider whether this is a Scotch or a foreign debt. Yet sometimes this expression is used in the cases without affording any accuracy of description, for sometimes the debt is called English or French in respect of the place where the contract was made; sometimes it is the place of the origin, sometimes of the payment of the contract, and sometimes of the domicile of one of the parties. But at all events it becomes important to consider whether this was a foreign or a Scotch debt. In the present case it was held most properly to be a foreign debt. That is a fact admitted; it is out of all controversy. This therefore must now be taken to be a French debt, and then the general law is, that where

the acceptance is general, naming no place of payment, the place of payment shall be taken to be the place of the contracting of the debt. I shall therefore deal with this bill as if it was accepted payable in Paris.

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On these short and admitted facts, and on this further assumption, that the bill being accepted in France is payable there, the question arises, and it is one which is not only the principal point, but it disposes of all the rest, namely, which of the two laws, the law of France, where the bill is accepted and is payable, or that of Scotland, where the debtor resides, shall rule the decision of the case. That is, in other words, whether the prescription set up is to be that of Scotland or France. The law on this point is well settled in this country, where this distinction is properly taken, that whatever relates to the remedy to be enforced, must be determined by the *lex fori*, the law of the country to the tribunals of which the appeal is made. This rule is clearly laid down in *The British Linen Company v. Drummond* (c), *De la Vega v. Vianna* (d), and in *Huber v. Steiner* (e), though the reverse has previously been recognised in *Williams v. Jones* (f). Then assuming that to be the settled rule, the only question in this case would be, whether the law now to be enforced is the law which relates to the contract itself, or to the remedy. When both the parties reside in the country where the act is done, they look of course to the law of the country in which they reside. The contract being silent as to the law by which it is to be governed, nothing is more likely than that the *lex loci contractus* should be considered at the time

(c) 10 Barn. & Cres. 903.

(d) 1 Barn. & Adol. 284.

(e) 2 Scott, 304; 1 Hodges,
206; 2 Bing. N. C. 202; 2

Dowl. Prac. Cas. 781; and 4
Moore & Scott, 328.

(f) 13 East, 439.

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the rule, for the parties would not suppose that the contract might afterwards come before the tribunals of a foreign country. But it is otherwise when the remedy actually comes to be enforced. The parties do not necessarily look to the remedy when they make the contract. They bind themselves to do what the law they live under requires; but as they bind themselves generally, it may be taken as if they had contemplated the possibility of enforcing it in another country. That is the lowest ground on which to place the case. The inconvenience of pursuing a different course is manifest. Not only the principles of the law, but the known course of the courts renders it necessary that the rules of precedent should be adopted, and that the parties should take the law as they find it, when they come to enforce their contract. It is true that there may be no difficulty in knowing the law of the place of the contract, while there may be a great difficulty in knowing that of the place of the remedy. But that is no answer to the rule. The distinction which exists as to the principle of applying the remedy, exists with even greater force as to the practice of the courts where the remedy is to be enforced. No one can say that because the contract has been made abroad, the form of action known in the foreign court must be pursued in the courts where the contract is to be enforced, or the other preliminary proceedings of those courts must be adopted, or that the rules of pleading, or the curial practice of the foreign country must necessarily be followed. No one will assert that before the Jury Court in Scotland the English creditor of a domiciled Scotchman would have the right to call for a trial of the case by a jury; or take the converse, that a Scotchman might refuse the intervention of a jury here, and insist on having the case tried, as in Scotland, by the judge

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only. No one will contend in terms that the foreign rules of evidence should guide us in such cases ; and yet it is not so easy to avoid that principle in practice if you once admit, that though the remedy is to be enforced in one country, it is to be enforced according to the laws which govern another country. Look to the rules of evidence, for example. In Scotland some instruments are probative ; in England, until after the lapse of thirty years, they do not prove themselves. In some countries forty years are required for such a purpose ; in others thirty are sufficient. How, then, is the law to be ascertained which is to govern the particular case. In one court there must be a previous issue of fact ; in another there need be no such issue. In the latter, then, the case must be given up as a question of evidence. Then come to the law. The question, whether a parol agreement is to be given up or can be enforced, must be tried by the law of the country in which the law is set in motion to enforce the agreement. Again, whether payment is to be presumed or not, must depend on the law of that country, and so must all questions of the admissibility of evidence, and that clearly brings us home to the question on the Statute of Limitations. Until the Act of Lord Tenterden, a parol agreement or promise was sufficient to take the case out of the Statute of Limitations ; but that has never been the case in Scotland. It is not contended here that the practice of England is applicable to Scotland ; but these are illustrations of the inconvenience of applying one set of rules of law to an instrument, which is to be enforced by a law of a different kind. It is said that the limitation is of the very nature of the contract. First, it is said that the party is bound for a given time, and for a given time only : that is a strained construction of the obligation. The party

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does not bind himself for a particular period at all, but merely to do something on a certain day, or on one or other of certain days. In the case at the bar the obligation is to pay a sum certain at a certain day, but the law does not suppose that he is at the moment of making the contract contemplating the period at which he may be freed by lapse of time from performing it. The argument that the limitation is of the nature of the contract, supposes that the parties look only to the breach of the agreement. Nothing is more contrary to good faith than such a supposition. If the law of the country proceeds on the supposition that the contracting parties look only to the period at which the Statute of Limitations will begin to run, it will sanction a wrong course of conduct, and will turn a protection against laches into a premium for evasiveness.

Then it is said, that by the law of Scotland not the remedy alone is taken away, but that the debt itself is extinguished, and thus a distinction is relied on as taken by the law between an absolute prescription and the limitation provided by the statute. But it seems to me that there is no good ground for supposing such a distinction. I do not read the statute in that manner. The Act of 1772 is an act for the limitation of the enforcement of titles to bills and notes, and the enactments of it are strong with respect to the remedy to be enforced. The debt, however, is still supposed to be existing and owing.

It is not necessary to discuss the excellent distinction taken by Mr. Justice Story (*g*), and approved of in the Court of Common Pleas in the case of *Huber v. Steiner* (*h*); namely, that where statutes of limitation are held to govern the rights of parties, it must be where the parties are resident within

(*g*) Story's Conflict of Laws,
 s. 582.

(*h*) 1 Hod. 210; 2 Scott, 304;
 2 Bing. N. C. 202,

the jurisdiction during the period. That may be taken as the ground of the decision of the Court in that case. But there is another principle to be considered, on which there are some Scotch cases that must not be overlooked. *Galbraith v. Cunningham* (i), in 1626, where a suit on an Irish bond, not executed according to the law of Scotland, was sustained in the Scotch courts, is a case of this kind. There was another case, of *Salton v. Salton*, in 1673 (k), on a bond made in France; and in both instances, the instrument being valid according to the law of the country where it was made, though not according to the law of Scotland, the suit was sustained. These cases show that in them it was considered that the law of the country where the instrument is made ought to prevail. But a contrary decision occurred in 1691, the Montrose case, and another, *Grey v. Grant*, in 1789 (l), which was brought before the Lords Commissioners, who then refused to admit in the Scotch courts such proof of a debt contracted in a foreign country as would have been sufficient proof in the country where the debt was contracted, but was not sufficient proof according to the law of Scotland. *Muir v. Muir*, decided in 1787, went to the same point. *Glyn v. Johnston* (m) seems to cast some doubt upon this point, as it was then held that the foreign law might be imported for such a purpose; and in *Gibson v. Stewart* (n) the same rule was adopted, but there the domicile of the debtor made the whole difference, which was clearly wrong. The grounds of the opinion in this case are to be found in the case of *Glyn v. Johnston*. From the

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(i) Morr. 4430.

(k) Id. 4431.

(l) Id. 4474.

(m) 8 Shaw & Dunl. 889.

(n) 9 Shaw & Dunl. 525.

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judgment there, it appears that the whole of the *lex loci contractus* must be adopted from the foreign country. But it is to be observed, that Lord Craigie (o) dissented from that judgment, saying that no evidence could be received except such as was allowed by the law of Scotland. The preference of the *lex loci solutionis* is derived from a sounder principle, that of the *lex fori*. The law of the domicile of the debtor comes from the same ground. The consideration of the forum prevails much more than any other throughout the cases, but it must be admitted that there is on the whole a conflict of the cases in the Scotch courts. But though many of the Scotch authorities cannot well be reconciled with each other, the cases of *Talleyrand v. Boulanger* (p), in Chancery, and of *Melan v. Fitzjames* (q), in the Common Pleas, furnish better guides for us; nor are those cases impugned by the principles to be drawn from *Groves v. Gordon* (r), or *Phillips v. Stamfield* (s). *Groves v. Gordon* proceeds upon reasons which will not support the decision, and much reliance cannot be placed upon *Phillips v. Stamfield*. All the Judges agreed, that if it was not a case of traffic and of merchants, the law of Scotland must decide, though they were divided on the main point of the case. *Della Valle v. The York Buildings Co.* (t) is not an authority, for the question there arose upon different circumstances, namely, those of the debt being extinguished. The ground of the decision was, that the bond might be sued on in England, and therefore did not fall within the particular words of the Statute of 1469 (u), which de-

(o) 8 Shaw & Dunl. 891.
 (p) 3 Ves. 449.
 (q) 1 Bos. & Pul. 138.
 (r) Morr. 4511.

(s) Morr. 4503.
 (t) Id. 4472.
 (u) Scotch Acts, vol. 1, p. 95.

clares that certain bonds, &c. there mentioned “shall be of none avail.”

Let us now see whether this was a French contract. Suppose a policy of insurance was effected in this country on a ship for a voyage from port to port in America, it could not be said that that was an American contract, or that the money due upon the policy was an American debt. *Fawkes v. Aiken*, and *Wray v. Wright*, are wholly irreconcilable both with that which is now admitted to be law, and with the principle which I have stated. Then there are the cases of *Thomson v. Lythgoe*, and *Renton v. Bayley*, in July 1751, the latter of which is the case to which Erskine refers as settling the law. They were followed by *Macniel v. Macniel*, in 1761, by *Randal v. Innes* (x), in 1768, and by *Ker v. Home* (y), in 1771, all of the same kind. All the authorities, Huber de Conf. Leg. (z), Voet (a), and Lord Kaimes (b), are cited in that case. *Campbell v. Steiner* (c), was an action for a bill of costs for business done in this House. The Court below there allowed the rule of Scotch prescription. That judgment was affirmed by Lord Eldon, who, however, said that he moved it with regret. He said that it had been ruled that the debtor being in Scotland and the creditor in England, the debtor might plead the Scotch rule of prescription; that that was against some of the old authorities, but was in accordance with those of later date. That case cannot be reconciled with the principle that the *locus solutionis* is to prescribe the law. It has nothing to do with the case. Why is it, then, that the law of the domicile of the debtor was there allowed to prevent the plaintiff from recovering? It

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(x) Morr. 4520.

(y) Id. 4522.

(z) De Conf. Leg. in Div.
Imp.

(a) Dig. Lib. 24, t. 3, s. 12.

(b) Kaimes's Principles of

Equity, 3. 8. 6. 1. 5. 3.

(c) 6 Dow. 116.

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was because the creditor must follow the debtor, and must sue him where he resides, and by the necessity of that case, was obliged to sue him in Scotland. In that respect, therefore, there was in that case no difference between the *lex loci solutionis* and the *lex fori*; and it must be admitted that in such a case the rules of evidence, and if so, the rules of practice, may be varied as they are applied in one court or the other. But governing all these cases, is the principle that the law of the country where the contract is to be enforced, must prevail in enforcing such contract, though it is conceded that the *lex loci contractus* may be referred to for the purpose of expounding it. If, therefore, the contract is made in one country to be performed in a second, and is enforced in a third, the law of the last alone, and not of the other two, will govern the case. In reversing the most material part of the interlocutor appealed from, you do not introduce the law of England or of the commercial world into Scotland, but you are renewing in Scotland the principles of the old law of that country. The Appellant was an alien enemy in France, and could not appear in the French courts; he was, too, out of the country, and he could not possibly possess any property, real or personal, by which he could be rendered amenable.

But supposing that the debt might have been sued for in France, then comes the question, whether the French judgment cannot be sued on as a substantive cause of action. It is, in fact, tendered as one of the grounds of suit here. A foreign judgment is good here for such a purpose, provided that it has not been obtained by fraud or collusion, or by a practice contrary to the principles of all law. *Fraser v. Sinclair*(d),

(d) Morr. 4543.

which was affirmed in this House, showed that we regard a foreign judgment only as *prima facie* evidence of a debt. *Buchanan v. Rucker*(e) established that the court before which a foreign judgment is brought by a proceeding of this sort may examine whether it has been rightly obtained or not, and the principle of the decision cannot be confined to the case of a party not being within the jurisdiction at the time the judgment is obtained. If he is a foreigner, and is not within the jurisdiction, but is by force kept out of it before the action, and is not sued by proper forms, his case is even stronger than that of the defendant in *Buchanan v. Rucker*, and he must have the same principle applied to it. The case in the 4 Bing. (f) shows how much the application of the rule is affected by circumstances. In that case, which was an action in an English court on a Scotch judgment of horning against a Scotchman born, the Court guards itself against a general inference from the decision. The Chief Justice, in delivering the judgment of the Court, says (g), "We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, and by the laws of which country his property was, at the time those judgments were given, protected." *Beckett v. Mac Carthy*(h) has been supposed to go to the verge of the law, but the defendant in that case held a public office in the very colony in which he was originally sued.

It cannot be doubted, that a foreign judgment is the same as to our right to examine into it in the Courts of this country, whether made in the absence of par-

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(e) 1 Camp. 63; 9 East, 192. (g) Id. 703.
 (f) *Douglas v. Forrest*, 4 Bing. 686. (h) 2 Barn. & Ad. 951.

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ties, or with both of them present, *in foro contentioso*. On the whole of the case, my motion is to reverse the interlocutors of the 10 June 1835, and 20 January 1836, and to declare that the evidence of the sexennial prescription ought to be sustained, and that it is not affected by the proceedings which have taken place in the French court.

The following order was afterwards made and entered on the Journals.

“ It is *ordered* and *adjudged* by the Lords, &c., that the said interlocutors, in so far as complained of in the said appeal, be, and the same are hereby reversed; and it is declared that the defence of the sexennial prescription, according to the law of *Scotland*, ought to be sustained; that this prescription has suffered no interruption by reason of the proceedings in the *French* court; that these proceedings do not constitute a new ground of debt, nor evidence of a debt independent of the bill libelled upon; and that the debt can only be proved by the writ or oath of party, reserving all defences for the Appellant; and it is further *ordered* and *adjudged*, that with this declaration the cause be remitted back to the Court of Session in *Scotland*, to do therein as shall be just and consistent with this judgment,

IN COMMITTEE OF PRIVILEGES.

The SLANE Peerage.

B. claiming, of right, to be Lord Baron of Slane, in the peerage of Ireland, as heir general of the last Lord Slane, and alleging that the same was a barony in fee, showed by his statement and proofs, that from the first creation of a peerage in his ancestors to the year 1597, four such peers, dying at various periods without issue male, but leaving daughters or sisters, were severally succeeded in the dignity by the heirs male, uncles or cousins, who were in possession of the family estates. The claimant further showed that a Lord Baron of Slane, whom he alleged to be the last peer of the family, and of whom he stated himself to be sole heir general, left a daughter, an only child, who long survived him but did not claim the peerage, and also two sisters, the elder of whom he stated to have died without issue, and from the younger the claimant derived his descent as her sole heir. HELD that the claimant, though he might be heir general, had failed to make out his claim to the dignity, as it appeared by his own statement to have gone uniformly to the heirs male in exclusion of the heirs female, who had never made claim to it.

F., whose petition to the King claiming the barony of Slane as heir male was referred to the Attorney-general, but no report made thereon, was, upon petition to the House of Lords and a statement by the Attorney-general to the Committee of Privileges, admitted to appear by his counsel and agents to oppose *B.*'s claim.

If in a claim of peerage, an important question of law arises, the Committee will depart from the ordinary rule, and hear two counsel on each side.

In a claim of peerage, where there is no patent of creation or enrolment of such patent, and the contemporaneous Lords' Journals are not in existence, an old MS. book, purporting to be copied from the Journals by an officer whose duty

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1831 :
March 10.
July 20.
Aug. 3. 24.

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March 27.
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15. 29.
August 31.

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it was to prepare lists of peers present and absent, will be received as evidence of a peer's sitting in Parliament.

A return to a royal commission, not signed nor sealed by the commissioners, is not admissible to prove any matter therein stated.

A pedigree made by a person with a view to a suit respecting property is not receivable in a claim of peerage by his son to prove his descent; nor a case stated for the opinion of counsel, produced from the family papers of a distant relative of the claimant.

Entries in a family missal are admitted as evidence of births, deaths, and marriages of members of the family, just like similar entries in a family Bible.

To make a copy of a record admissible in evidence, it is not enough that it was held by witness while another read the original to him. There must be a change of hands, or the witness must himself read the copy with the original.

TWO petitions were presented to the King in the year 1828, claiming respectively the title and dignity of Baron of Slane, in the peerage of Ireland; the first of them, by James Fleming, Esq., since of the Middle Temple, barrister-at-law, claiming as heir male of the Lords Slane; the other by George Bryan, Esq., of Jenkinstown, in the county of Kilkenny, claiming as heir general of Christopher, last Lord Baron of Slane, and of two other Lords Slane, his predecessors, hereinafter mentioned. Both petitions were referred to Sir Charles Wetherell, then Attorney-general, who was attended by the agents of the parties, and received evidence of the respective claims, but resigned office without making any report.

Mr. Bryan presented a second petition to the King in 1829, stating, in substance, as follows:—That Thomas Fleming of Slane, in the county of Meath, Esq., *titular Baron* (a) of Slane, on the 26th of April 1585

(a) See pedigree, *infra*, p. 35.

was summoned to the Parliament, held before Sir John Perrott, then Lord Deputy of Ireland, by the title of *Lord Slane*: That he died without male issue in 1597, leaving two daughters, Catherine, who became the wife of Pierce Butler, of Kilkenny, Esq., ancestor to the Lords Viscounts Galmoy, since attainted; and Elinor, who became the wife of her cousin, William Fleming, *titular Baron* of Slane, who, as heir male to her father, inherited his estates; but the title went into abeyance between these two ladies: That Christopher, eldest son of said Elinor and William Fleming, was summoned to the Parliaments held in Dublin in 1613 and 1615, and sat in both; and by such summons, the abeyance of his grandfather's dignity of Lord Slane was terminated in his favour, or a new peerage was created in him, the said Christopher, by such summons and sitting: That he died in the year 1625, leaving six sons, viz. Thomas, William, John, Patrick, James, and Lawrence. the four last of whom died without issue: That by a King's letter, dated 30th October 1629, reciting that Thomas, the eldest son, became a friar, residing in parts beyond the seas, in his father's lifetime, and his father thereupon settled his lands and hereditaments in Ireland, after his own decease, on William, his second son, and the heirs male of his body, with remainders, in like manner, on his other sons, wholly excluding Thomas; the King (Charles I.),—"forasmuch as his Majesty was given to understand that the said Thomas, being resolved to persist in that course of profession, was not only content to relinquish unto the said William, his brother, the title of Baron Slane and all estates, which by the laws of that kingdom were descended upon him, but also humbly desired that his Majesty would be graciously pleased

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to give way, that during his (said Thomas's) life his said brother William, and the heirs male of his body, might be reputed Barons of Slane,—taking into consideration the many services in former times done to the Crown by the ancestors of the said William, and to nourish still that good disposition, &c., was therefore graciously pleased, and thereby declared his royal will and pleasure to be, that the said William, and the heirs male of his body, shall be from henceforth, during the life of his said elder brother, styled Barons of Slane; and farther, that special care be had that, in all meetings and assemblies of Parliament, or otherwise, where the said William shall happen to be, or the heirs male of his body, in case he die in the lifetime of his elder brother, he or they shall have the same places and precedence which of right belonged to his father; but with this caution, that if the said Thomas shall hereafter, quitting the habit and life which he is now entered into, return unto his country, claiming the said title of honour, and the estates cast upon him by the law, this declaration shall be no ways prejudicial to him."

The petition further stated that William Fleming, the second son, was allowed, under the foregoing authority (*b*), to take his seat in Parliament on the 14th of July 1634, his brother Thomas being then alive; that he married a daughter of the Earl of Antrim and had four sons by her, viz. Charles, Randall, Michael (who died unmarried), and Thomas (whose issue was extinct), and, dying in 1641, was succeeded

(*b*) In a printed paper laid before the Committee of Privileges by Mr. Bryan, it was stated that the Lord-deputy and peers of Ireland did not submit to the King's letter, but resolved that said William and his heirs should be called up by writ, and that a writ was accordingly issued to him with the same precedence his father had.

by his eldest son, Charles, Lord Baron of Slane, who died unmarried, and was succeeded by his brother, Randall, Lord Baron of Slane. He (Randall) married two wives; first, Elinor Barnwall, daughter of Sir Richard Barnwall, by whom he had an only daughter, Mary, who married, first, Richard Fleming, Esq., eldest son of Sir John Fleming of Staholmock; and, secondly, Oliver O'Gara, Esq. By her first husband she had an only son, James Fleming, who died young and unmarried, and an only daughter, Bridget, who became the wife of Randall Plunkett, eleventh Lord Baron of Dunsany, from whom is descended Edward, now fourteenth Lord Baron of Dunsany, co-heir general with petitioner of Mary Fleming (c).

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That the said Randall, Lord Baron of Slane, by his second wife, Lady Penelope Moore, daughter of Henry first Earl of Drogheda, had three sons and one daughter, Christopher his heir, and Henry and Randall (both of whom died without issue), and Alice; and, dying in 1676, he was succeeded by his eldest son, Christopher, Lord Baron of Slane, who, taking part with King James 2nd., was outlawed for high treason and forfeited his honours and estates, but was afterwards restored in blood, though not to his estates, by an Act of the English Parliament, in 1708. He married the daughter of Sir Patrick Trant, and, dying, left an only daughter and heir, Ellen, who died unmarried at Paris in 1748, on whose death the peerage of Lord Baron of Slane went into abeyance between the heirs of Mary and Alice, the said two daughters of Randall, Lord Baron of Slane; that Alice became the wife of Sir Gregory Byrne of Tymogue, in the Queen's County, by whom she had

(c) This statement of Lord Dunsany's descent was said, in the Attorney-general's report, to be erroneous. *Vide infra*, pp. 31, 32.

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several sons; Charles, the eldest, married and had several children, who all died without issue; and Henry Byrne, the second son, left an only daughter and heir, Catherine Xaveria, who became the wife of George Bryan, of Portland-place, London, Esq., by whom she had George Bryan, the petitioner, her only surviving son and heir, who is now sole heir of said Alice, and, as such, one of the two (*d*) co-heirs general of said Randall Lord Baron of Slane, of his father, William Lord Baron of Slane, and of his grandfather, Christopher Lord Baron of Slane, summoned to Parliament in 1613 and 1615, in whose favour was terminated the abeyance of the peerage created in his maternal grandfather, Thomas, Lord Baron of Slane, in 1585.

The petitioner, after referring to his former petition and to the petition presented by Mr. Fleming, and stating that the latter “founded his claim on a ground altogether new and unprecedented, viz. that there are peerages in Ireland, originating previously to the introduction of either writs of summons or patents, which have always descended to the heirs male, and that this peerage of Slane is one of them, thus alleging a new point of law involving the rights and privileges of the ancient peers of the realm and the laws affecting the same,” prayed his Majesty to refer petitioner’s claim to the House of Peers for their Lordships’ consideration, and report whether the said title be, or be not, a barony in fee by writ of summons descendible to heirs general; and whether the same is, or is not, now in abeyance between Edward Lord Dunsany (*e*) and petitioner.”

(*d*) See note (*c*), *supra*, p. 27.

(*e*) *Id. ib.*

This petition was referred to Sir James Scarlett, then Attorney-general, who reported thereon as follows:—"I have considered the said petition, and have been attended by the agent of the petitioner, who, in the first instance, stated to me, That the family of Fleming was descended from Richard le Fleming (*f*), who accompanied Sir Hugh de Lacy to Ireland in the reign of King Henry 2nd, and obtained a grant from him of the lands of Slane in his Palatine honour of Meath, in which the said Hugh possessed the regalities; and the said Richard and his successors, for five generations, were Barons of that Palatinate, and were styled in the ancient records Barons of Slane. That Baldwyn le Fleming, the sixth Palatine Baron of Slane (son of Richard, son of Baldwyn, son of Stephen, son of Richard, son of the first-mentioned Richard le Fleming), having married a daughter of Simon de Geneville, son of Geoffrey de Geneville, then lord of the honour of Meath, in right of his wife, the heir of de Lacy, thereby became allied also to the Mortimers, Earls of March and Ulster, the chief of which family, Roger de Mortimer Earl of March, was the king's lieutenant in Ireland; and, in consequence of this connexion, the said Baldwyn, Palatine Baron of Slane, acquired influence, and was summoned to the Parliament held at Kilkenny, the 3rd Edward 2nd, not by the title of "Baron of Slane," but by writ directed to him by the name of "*Baldwyno le Fleming*." That he was succeeded by his son, Simon Fleming, who sat in Parliament in the reign of King Edward 3rd, and he by his son Thomas, third Lord le Fleming, who sat in Parliament in the reign of King Henry 4th, and was succeeded by his son Christopher, fourth Lord le Fleming, and ninth

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(*f*) See pedigree, pp. 33 and 34, *infra*.

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lord of the manor or barony of Slane, who sat in Parliament in the reign of King Henry 6th, and was succeeded by his grandson Christopher (son of John, who died in his father's lifetime), who sat in Parliament 29th Henry 6th, and who dying unmarried, his two sisters, Anne and Amy, became his co-heiresses, between whom the peerage of le Fleming went into and is still in abeyance among their heirs (the Dillons and Bellews).

“ That the manor of Slane being settled on the heirs male, and held of the Lords of Meath in fee tail, went to David Fleming, uncle of the half-blood to said Christopher, the fifth Lord le Fleming. That David was summoned to and sat in the Parliament of King Edward 4th by the title of *Lord David Fleming, Baron of Slane*, and thus became a peer by a new writ of creation, and he was allowed the precedence of the old peerage then in abeyance between his said nieces, but was placed after Sir Christopher Preston, Lord of Kells in Ossory and of Gormanstown. That this Lord David Fleming was succeeded by his only son, Thomas Lord Fleming, who dying childless, the peerage created in his father became also in abeyance between his sisters, Anne, Margaret, and Elizabeth; among whose heirs it is still in abeyance.

“ That the manor of Slane, being held as aforesaid, went to the heir male, James, son of William Fleming, second son of Thomas, third Lord le Fleming. This James (thirteenth Palatine Baron of Slane) was also summoned to the Parliament held 12th Edw. 4th, and sat therein, and also in the Parliament of Ric. 3rd by the title of *Lord Baron of Slane*. He was succeeded by his son Christopher, who sat in the Parliament held 9th Henry 7th, and he was succeeded by his son James, who sat in the Parliaments held 31

Henry 8th and 2 Eliz., and dying unmarried the peerage created by his grandfather's summons and sitting went also into abeyance between his two sisters, Catherine and Elinor.

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“The claimant's agent having made the foregoing statement relative to the several creations of peerage in the family of Fleming anterior to that of 1585, from which the petitioner commences his claim, proceeded to lay before me evidence in support of the allegations of his petition, with this difference, that he now claims to be the sole heir of the said Christopher, last Lord Baron of Slane therein mentioned, of his father, Randall Lord Slane, and grandfather, William Lord Slane, &c., instead of being co-heir with Lord Dunsany of the aforesaid peers, as stated in his petition; and he accounts for this change of claim as follows: that the present and late Lords Dunsany having alleged publicly that they considered themselves as heirs of Bridget Fleming, daughter and sole heir of Richard Fleming, Esq., eldest son of Sir John Fleming, of Staholmock, co-heirs of Randall Lord Slane, with the heir of Alice Fleming, only daughter of the said Randall by his second wife; and it also appearing in the pedigree of the late Lord Dunsany, produced to the House of Peers of Ireland in March 1785, that his grandfather was married to Bridget, daughter of said Richard Fleming, and that she was grandmother to the said Lord Dunsany; and it appearing by other evidence that said Richard Fleming was married to Mary Fleming, only daughter of Randall Lord Slane, by his first wife Elinor Barnwall, claimant verily believed that the said Mary was the mother of the said Bridget; but upon search being afterwards made for proofs of Lord Dunsany's descent, it was found, in a bill filed in the Irish Court of

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Chancery, in 1724, against his grandfather, Randall Lord Dunsany, and Bridget his lady, and in their answer thereto, that she, Bridget, was daughter of the said Richard Fleming by a former wife, *then deceased*, and not by the said Mary Fleming, co-heir of Christopher, Lord Slane, as it appeared from another bill filed in the Irish Court of Chancery in 1731, that the said Mary Fleming was then living, she, as a defendant thereto, having put in an answer, in which she stated herself to be the widow of Richard Fleming, of Staholmock, and also of Oliver O’Gara, thus clearly stating her identity and her existence in 1731, and therefore Mr. Bryan now claimed as *sole* heir of Christopher Lord Slane (g).”

The report, after stating at great length the various documents, and other evidence produced before the Attorney-general by the petitioner’s agent in support of his claim, which were the same that were afterwards produced before the Committee of Privileges, and are in part hereinafter mentioned, concluded thus: “Upon the whole of the case, I am of opinion that there are strong grounds to conclude that the summons of Christopher Lord Slane, and his sitting in the Parliament of Ireland, held in the years 1613 and 1615, may be considered as a determination of the abeyance of the peerage created in Thomas Lord Slane, by his summons and sitting in Parliament in 1585 (supposing him to have so sat), in favour of the said Christopher; or as a new creation, descendible to his heirs, and that the said title, whether a new creation or determination of the abeyance, was inherited by his eldest son, Thomas, who being a Roman Catholic

(g) Lord Dunsany presented a petition in 1831, denying the conclusions drawn from these bills and answers, and claiming to be co-heir of the last Lord Slane, but stating as his belief that peerage to be descendible solely in the male line.

priest, left no issue, but was presumed to be dead in the year 1634, and that the writ of summons in 1634 to William Fleming, the second son of Christopher, if not a new creation, upon the supposition that his eldest brother Thomas was then living, was a recognition of the title in him upon the death of that brother without issue, which title was therefore descendible to the heirs of the said William, whether his brother Thomas had issue or not. Upon consideration of the evidence produced, and having carefully examined each document, and finding and believing them all to be genuine and free from suspicion, I humbly offer it as my opinion, that the claimant, George Bryan, Esq., has proved himself the heir of Alice Fleming, the younger daughter of Randall, Lord Baron of Slane, and that the said Alice was sole heiress of Hellen Fleming, only daughter and heiress of Christopher, Lord Slane. But as there may be some question as to what was the effect and consequence of the said writs of summons, and some doubt as to some particulars of the evidence upon it when it comes to be judicially investigated, I am humbly of opinion that this claim should be referred to the consideration and report of the House of Peers, if Your Majesty in your wisdom should be graciously pleased to do so. *J. Scarlett.*

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PEDIGREE OF THE FAMILY OF FLEMING.

Richard le Fleming, son of Archibald Fleming of Devonshire, attended Hugh de Lacy to Ireland, and got from him a grant of 20 knights' fees in Meath, afterwards called the *Barony of Slane and Newcastle*. One of the Barons of that Palatine liberty.

Richard le Fleming, 2d Palatine Baron of Slane and Newcastle.

Stephen le Fleming, 3d Palatine Baron of Slane and Newcastle.

Baldwin le Fleming, 4th Palatine Baron of Slane and Newcastle.

Richard le Fleming, 5th Palatine Baron of Slane and Newcastle.

The Barons of Slane of the Palatine Lordship of Meath, previous to their elevation to the Peerage.

First Peerage.] Baldwin le Fleming, son of Richard, and 6th Palatine= Matilda, daughter of Sir
Baron of Slane, summoned to Parliament by writ, Simon de Geneville, by
as Lord le Fleming, 3 Edw. 2, first Peer of Parlia- Matilda de Lacy, great
ment. granddaughter of Hugh de
Lacy.

Sir Simon le Fleming, eldest son, sat in Parliament in the reign of Edw. 3.=

Sir Thomas le Fleming, 3d Lord le Fleming, sat in= Elizabeth, daughter of Lord Kells and
Parliament 4th Henry 4. Gormanstown.

Levita Ferrars,= Sir Christopher Fleming, 4th Lord le=Elizabeth William Fleming, 2d son.
1st wife. Fleming. Wogan, [See Pedigree of 3d Peer-
2d wife. age, infra.]

John Fleming, only son= Anna
by 1st wife. Rochfort.

David Fleming, only son by 2d wife.
[For him and his issue, see 2d Peerage, infra.]

Christopher Fleming, 5th Lord le Fleming,
heir to his grandfather, sat in Parliament
29 Hen. 6. Ob. s. p.

Walter
Dillon.

Anne
Fleming,
eldest sis-
ter, co-heir.

John
Bellew.

Amia
Fleming,
second sister,
co-heir.

First Abeyance.

Second Peerage.] David Fleming (only son of Christopher, 4th Lord le Fleming, by= Alice
his 2d wife) inherited the manor of Slane, as heir male of his Dillon.
nephew Christopher, 5th Lord le Fleming. He was summoned
to Parliament, and sat 2 Edw. 4. Ob. 1463.

Thomas, Lord Fleming. Ob. s. p. 1471. The title created by
the summons and sitting of his father became in abeyance between
his sisters; the manor or barony of Slane went to his cousin, James
Fleming, his male heir.

Anne, Margaret, Elizabeth,
co-heir. co-heir. co-heir.

Second Abeyance.

Third Peerage.] William Fleming, of Newcastle, 2d son of Thomas, 3d Lord le= Genetta
Fleming. Rochfort.

Sir James Fleming succeeded to the manor of Slane on the death of Thomas,= Elizabeth,
Lord Fleming, as heir male, that estate being held in *fee tail*. He was summon- daughter of Sir
ed to and sat in Parliament 12 Edw. 4, as *James Fleming, Baron of Slane*. W. Wells, Lord
Chancellor of
Ireland.

Sir Christopher Fleming, 2d Lord
Slane. Sat in Parliament 9 Hen. 7.

Lady Elizabeth
Fitzgerald.

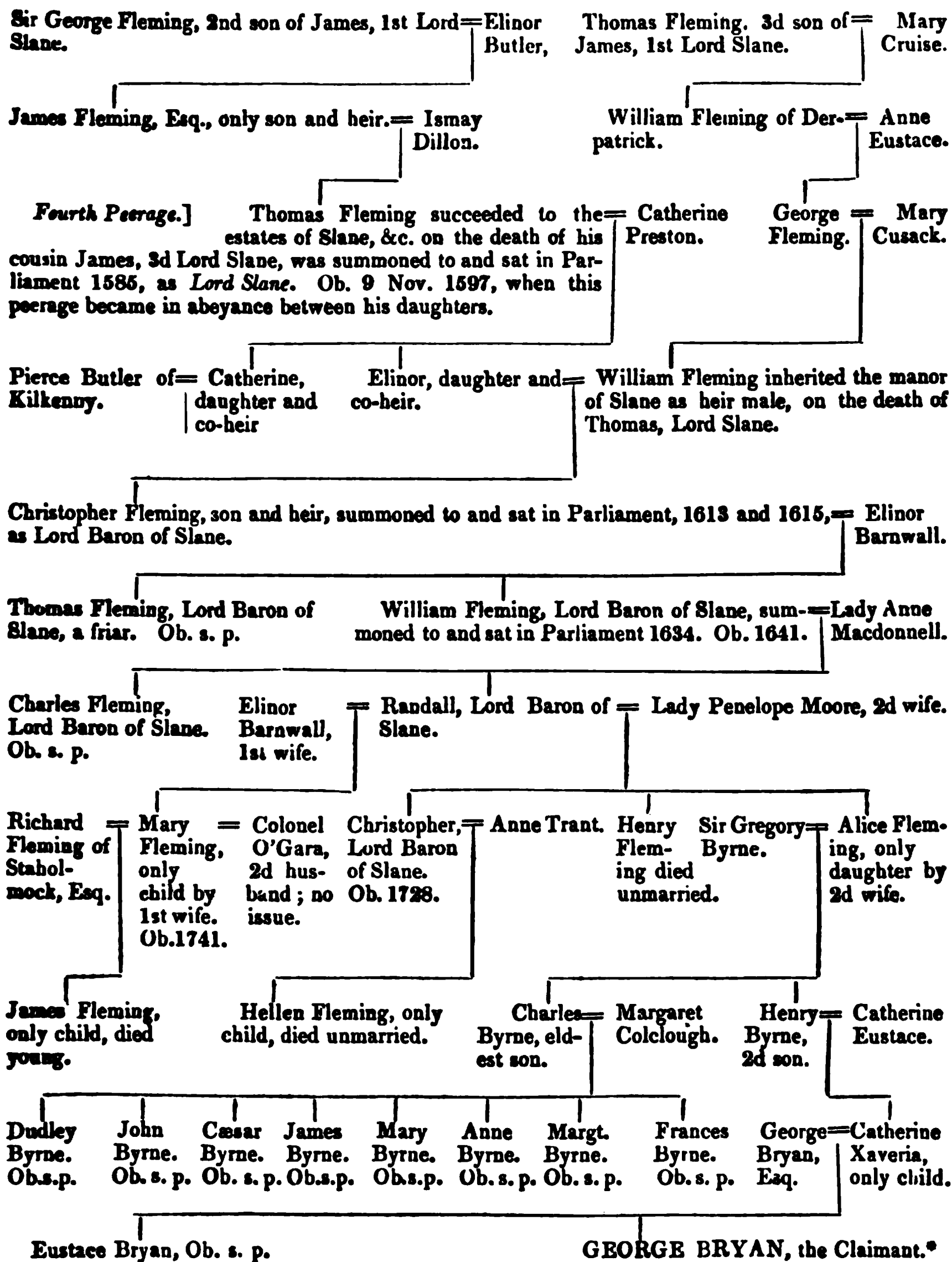
Sir George
Fleming of
Stephenstown.
[See Pedigree of 4th Peerage.]

Thomas Flem-
ing, of Derpa-
trick.

James Fleming, 3d Lord Slane. Sat in Parliament 31 Henry 8, and 2 Eliz.
Ob. s. p. 1577, when the peerage created in his grandfather's summons became
in abeyance, and the manor of Slane went to his cousin and heir male, Thomas
Fleming.

Catherine, Elinor,
co-heir. co-heir.

Third Abeyance.



* Mr. Fleming, the other claimant, also put in a pedigree, differing from the above in many respects, particularly in stating that there never was more than one Peerage of Slane; that the same was first conferred on Archibald le Fleming soon after the settlement of the English in Ireland, by the title of *Baron of Slane*, and that he and all who succeeded to the title, down to Christopher the 24th Baron of Slane (who died in 1772), were Peers of Parliament in Ireland.

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Mr. Bryan's petition having been referred by the King to the House of Lords, together with the Attorney-general's Report, Henry Fleming, Esq., of Dublin, presented a petition to the House, praying their Lordships not to adjudge the Barony of Slane to Mr. Bryan, until he had fully and clearly proved that, according to the usage and law of Ireland, he was entitled to it; and that time might be allowed until James Fleming, his eldest brother, then in France, and altogether ignorant of the steps taken by Mr. Bryan, should return, and have an opportunity of proving at the bar of their Lordships' House, the truth of the allegations contained in the petition.

The Committee of Privileges, to whom these petitions were referred, sat on the 19th of May 1830, and 10th of March 1831, to hear counsel for Mr. Bryan open the allegations of his petition, and to receive evidence in support of them.

To prove that Christopher Lord Slane was a Peer of Parliament, and sat as such in 1613, Sir *W. Betham*, Ulster King-at-Arms of all Ireland, being examined, said he had searched every office of record in Ireland and in London that he could think of, for patents for the creation of Peers, and he could find no patent creating a Lord Slane, nor any enrolment or registry of such a patent. There were no Journals of the House of Lords in Ireland in existence before the year 1634. He produced a MS. book from his office, written by Thomas Preston, Ulster King-at-Arms in 1634, containing entries of previous years, and continued by him and his successors in that office from that year. "*The Names of the Nobility*" was the only title of the book, but witness gave it the title of "*Cases of Precedence.*" It contained decisions of

the Lord Deputy and Council respecting precedence of Peers, and lists of Peers, which it was the duty of the King-at-Arms to lay before the House of Lords in Ireland the first day of every Parliament. It contained lists of the Peers present and absent the 16th and 18th of May 1613, purporting to be copied from the Journal Book, being like the entries in the existing Journal Book, by having the mark p^r put against the names of the Peers present. In the list of the 18th of May 1613, “copied out of the Journall Booke,” appeared the name “Dñs Slane,” with the mark p^r before it.

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The *Attorney-general* (Sir James Scarlett), who together with the *Solicitor-general* for Ireland (Mr. Crampton), appeared for the Crown, submitted to the Committee, that the evidence was not sufficient to entitle this book to be received as a copy of the Journals; the book not having been written by the officer in discharge of his official duty.

Mr. *Adam*, with whom were Mr. *J. S. M. Fonblanque* and Sir *Harris Nicolas* as counsel for Mr. Bryan, submitted that the book was admissible in evidence, because, among other reasons, it was the officer's duty, as the witness stated, to make a list of the Peers. In the absence of the Journals of that time, this book was the best secondary evidence.

The *Committee* received the evidence *de bene esse*.

To prove that Christopher, Lord Slane, sat in Parliament, the same witness produced from an enrolment on the Rolls of Chancery in Ireland, a copy of a Royal Commission, dated 27th August, 11 James 1, to inquire into certain disorders in Ireland; and,

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among others, why certain Peers ceased to attend their House; and also a copy of the return thereto; by which it appeared that Lord Slane sat in that Parliament. The same Commission, and the return to it, were also enrolled on the rolls of the Court of Chancery in England, but the return as on both rolls had neither seal or signature of the Commissioners.

The *Attorney-general* submitted, that as the return was not signed or sealed by the Commissioners, it was not evidence of the execution of the Commission.

Mr. *Adam*: The Commission was under the Great Seal of England, and returnable to the Court of Chancery here, and the Commission and return appeared in the records of Chancery in England and Ireland.

The *Committee* rejected the document; as, according to the evidence, *non constat* that it was not a draft of a return.

To prove the death of Christopher, Lord Slane, and his issue, a witness produced from the Rolls of Chancery in Ireland an examined copy of an Inquisition *post mortem*, taken 13th January 1625. The same witness produced from the Rolls-office in Ireland, a copy of the King's letter (set forth in the *Attorney-general's Report*), directing that William Fleming should be Lord Slane in the lifetime of his elder brother; and said all King's letters, directing patents to be passed in Ireland, were enrolled in Chancery there.

The *Attorney-general* submitted that this letter was not admissible in evidence, it not appearing to have been enrolled in Chancery under any rule of

law or practice requiring such documents to be there enrolled.

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Mr. *Adam*: The evidence is, that it is the uniform practice to enrol such documents in the Court of Chancery in Ireland.

The *Committee* received the document.

The Journals of the Irish House of Lords for 1634 and 1635 were produced to show that a writ of summons was issued to the said William, second son of Christopher, Lord Slane, on the conditions expressed in the King's letter, and that he accepted the same, and sat in the House of Lords.

Several Inquisitions *post mortem*, copies of enrolments of Acts of Parliament, extracts of the Bills and Answers in the Court of Chancery in Ireland, mentioned in the Attorney-general's Report, and a great number of other documents were put in and received, without objection, to prove the claimant's pedigree and case.

A paper, purporting to be a pedigree, and proved to be in the handwriting of the claimant's father, deducing his wife's descent from Randall, Lord Slane, was offered in evidence. The witnesses stated that the paper was found among the family papers of Mr. Bryan; that the pedigree was not made with a view to the present question, but to a suit respecting some estates, and to establish the father's status and title to them should an opportunity occur.

The question of the admissibility of the paper in evidence having been argued by the Attorney-general on one side, and Mr. Adam on the other, the Committee informed them that a pedigree, to be re-

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ceivable in evidence, must be a spontaneous effusion ; that, if made for a particular object in contemplation of litigation, it was not receivable ; such evidence could be received only on the ground of the perfect independence of the party making the pedigree at the time he made it.

To prove that Mary, daughter of said Randall, Lord Slane, by his first wife, left no child by Mr. O'Gara, her second husband, a copy of her will from the Prerogative Office in Dublin was offered in evidence. The Committee rejected it, holding that the original will, or the probate of it, must be produced (*f*).

To prove the death of the several sons of Sir Gregory Byrne and Alice his wife, of whom Mr. Bryan claimed to be grandson and sole heir, his counsel proposed to produce a case submitted for the opinion of counsel in 1777, alleging that they could prove the handwriting of the counsel whose opinion was annexed, and that the documents were found among the papers of a Mr. James Butler, who was a connexion of the Byrne and Bryan families, and great-grandson of the person who stated the case. The Leigh peerage case was referred to, in which a case made by an executor for the opinion of counsel was received in evidence.

The *Committee* informed counsel that the case could not be admitted as evidence. The connexion of Mr. Butler with the family was very remote ; statements for counsel were frequently drawn up for the purpose of obtaining a favourable opinion to drive the adversary to a reference, and for other purposes ; they were generally drawn up by the

(*f*) Netterville Peerage case, 2 Dow. & Clark, 342. The original will was produced and received on a subsequent day.

attorney, and not by the party whose statements they purported to be.

Several entries made by the claimant's father in a Missal, some dated in 1770, recording his own marriage with the claimant's mother, and the births of all their children, and the deaths of some of them, were read and admitted in evidence without any objection.

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The Committee sat again on the 20th and 28th of July 1831, to receive further evidence, and no Counsel appearing for the claimant, the *Attorney-general*(g) appearing for the Crown (on the 20th), stated that Mr. Fleming, who had been abroad and ignorant of the proceedings on Mr. Bryan's petition, had now returned to this country with further evidence in support of his claim, and had applied to him to resume the inquiry begun by Sir Charles Wetherell in his petition, but he felt a doubt whether such a course would be convenient, as the claim of Mr. Bryan had been already referred to the House. At the same time he felt it his duty to state, that the facts alleged by Mr. Fleming, would, if proved, go far to throw a doubt on Mr. Bryan's claim. He prayed the direction of the Committee whether he ought to proceed in the inquiry.

In consequence of this statement and of Mr. Fleming's application, an order was made permitting him to appear by his Counsel and agents to oppose Mr. Bryan's claim, and give evidence in support of his own. Accordingly Sir *Charles Wetherell* and Mr. *Lynch* appeared on his behalf before the Committee on the 3d and 24th of August 1831; the 27th of February, 27th of March, and 2d of April 1832; Sir *James Scarlett*, Mr. *J. S. M. Fonblanque* and Sir

(g) Sir Thomas Denman.

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Harris Nicolas attended for Mr. Bryan, and the Attorney-general for England and the Solicitor-general for Ireland(*h*), in behalf of the Crown, and a great many examined copies of ancient records were given in evidence for both claimants. A witness producing a copy of a memorandum roll in the Court of Exchequer in Dublin, said he compared the copy with the original roll, according to the usual custom of the office, the clerk in the office holding the original and reading it, while witness held the copy without changing hands, and what he heard the clerk read, corresponded with what witness saw in the copy.

The Committee informed counsel that the practice of the office in Ireland as stated, did not appear to their Lordships to be correct. The witness could not swear that this document was a close copy, and therefore it could not be received. It was important that it should be known that copies must be compared in a different manner, viz. by changing hands.

The same witness, producing a copy of a statute-roll said, that, besides comparing it in the usual way in the office, he read it with the original himself. That document was received as evidence.

On the 28th of July, the day last above-mentioned, after the Committee had received further evidence, Sir *James Scarlett* submitted that there was a preliminary question of law, which it would be desirable, before going into further proofs, to dispose of, as upon that question the whole case turned, namely, whether by the law of Ireland this peerage was descendible to heirs male only, and not to heirs general.

The *Attorney-general* observed that such a discussion might turn out to be useless in case the parties failed in their proofs, but he offered no objection.

(*h*) Mr. Perrin.

The Committee of Privileges approved of the course proposed, and on account of the great importance of the question, agreed to hear two counsel on each side.

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The Committee again met on the 23d of July 1832 for the purpose of hearing counsel on the preliminary question.

Sir *J. Scarlett* and Sir *Harris Nicolas* for Mr. Bryan:—The question in this case is of great importance to the peerage of Ireland. Mr. Bryan claims the Barony of Slane as heir-general of the person last seised of it. Mr. Fleming has presented, not a counter claim, but an opposition to Mr. Bryan's claim, contending that the descent of ancient baronies in the peerage of Ireland is not to the heirs general, but is confined to heirs male. Whether he shall make himself out to be heir male or not, in support of any claim he may hereafter make, is not the question now, but having a colourable, if not a real, claim to be considered as heir male, your Lordships' usual indulgence has given him an opportunity of opposing this claim, because if this were established, his would be for ever excluded. He, therefore, is to be heard for the purpose of contending that the law of descent of the peerage of Ireland is different from that of the peerage of England. On the other hand, we insist that the law of descent in both countries is the same.

The proposition contended for by Mr. Fleming appears to be new, for we do not find that any lawyer or text writer, or any decision of any court of justice, much less of a house of peers, either in England or in Ireland, gives any countenance to it. It has been the received opinion that the common law of

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England was and is the common law of Ireland. It is well known that, up to a recent period, when the Irish Parliament became more independent of that of Great Britain, writs of error lay from the courts of Ireland to the Court of King's Bench in England, and from that Court to this House, which fact, taken alone, is sufficient to establish that the common law of Ireland was the same as the common law of England. The procedure by which the decisions of the courts of justice in Ireland were examined, and either affirmed or reversed, was not by appeal, which would bring them to be considered before your Lordships' House according to the law of Ireland, but by writ of error. The Court, before which a writ of error is brought, decides only upon the record according to the law of that country in which the court of error is held. How could the Court of King's Bench in England, upon a writ of error, receive in evidence the law of Ireland? Where a court of justice administers the law in a case, in which the law of another country incidentally becomes a question, that law must be proved by evidence. But where a court holds jurisdiction, as a court of error, over the judgment of an inferior court, that court of error has no means of acquiring any knowledge of any law but that which governs the country whose law it administers, and in which it presides. We, therefore, put our case, in the outset, on the proposition that the common law of both countries is identically the same, except where particular alterations have been made for local purposes by Acts of Parliament. If, then, the law generally is the same, the law of descent, which is one of the most important laws in every country, must also be included in the general proposition, and be identical in both countries.

The general rules governing the descent of the

peerage in England are these: where a peerage is created by patent, its descent is governed by the words of the patent; where there is no patent, and the peerage is evidenced only by writ of summons and sitting in Parliament, then the descent is to the heirs general, and females not being excluded, a male may claim through them as heir general whenever a male exists who can sit in this House. That is the law of England. Upon what ground can any difference be suggested between that and the law of Ireland? It is supposed that the ancient Irish baronies were connected with territory, and so were the English in very early periods, in a certain sense. There is no doubt that those who were summoned to the ancient Irish Parliaments had certain territories, on account of which they were so summoned, except English peers, who were sometimes summoned to the Irish Parliaments without any such possessions. But what were those Irish baronies? Before the time of Henry 2d Ireland consisted, according to the best light we have, of a number of independent chieftaincies or principalities. There was no house of peers, no common union in that country resembling the House of Peers before the Parliament there was constituted after the Union of both kingdoms, constituted upon the same principles, and the peers summoned by the same rules as in the English Parliament. It is impossible to discover, in the early periods of the Irish Parliaments, any principle or ground upon which it can be contended that there would have been any law of descent or any mode of constituting the peerage of Ireland different from the law and usage that prevailed in England. A right to sit in Parliament could not have existed by any previous prescription before the Parliament was constituted.

These general propositions, concurring with the

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opinions and testimony of almost all persons of legal authority who have hitherto considered the subject, would appear to be sufficient for the decision of this question. But the right of the claimant does not rest on them only; cases have occurred in Ireland, where the very question has arisen whether a peerage goes to the heir general or to the heir male, and it has been settled in more than one case that where the barony is ancient, where it is only proved by the existence of a writ of summons and a sitting in Parliament, and where there is no patent, it descends to the heirs general. The case of the barony of De-la-Poer, in Ireland, is one of the decisions supporting that doctrine.

But an argument is drawn from the peculiar circumstances of this Barony of Slane, for the purpose of showing that if the descent be extended to heirs general in the way that Mr. Bryan claims, many inconveniences will arise. It is said, for example, that in tracing his claim from the first creation of the Slane peerage to the present time, if the rule for which we contend were applied, there would be four, if not five distinct peerages of Slane; because it appears that this peerage having been at several times, as we contend, in abeyance by reason of its descent to females, amongst whom it was divided, and whose posterity may still exist, the heir male, upon whom was entailed the family estate, was summoned to sit in the Irish House of Peers. It is said, therefore, that if Mr. Bryan can establish his claim as heir-general to the last Baron of Slane, who sat in the Irish Parliament, then the heirs male general of other Barons, who sat before, will be also entitled to claim. Supposing that proposition to be true, we are not afraid of meeting the consequence. Why should not the Crown, where a peerage is in abeyance, and likely,

from the number of females in a family, to remain so for ever, do that in Ireland which has often been done in England, namely, select some one individual of the family, more especially the person to whom the family estates descended, and place that person in the peerage? It has been very common in England to take the husband, upon whose wife and her sister co-heirs a peerage may have descended, and place him in this House. In the English Parliament, therefore, no such inconvenience as that insinuated, has been deemed an argument against the principle. There are now sitting in this House two distinguished peers who have each a Barony of *Clifford* adjudged to them by the House. The thing, therefore, is not without example. When a female heir existed, who could not take the barony, then another peer was summoned to sit for that barony, and when that female heir produced descendants who could sit and afterwards claimed, that claim has been allowed by this House, and there are now two Baronies of Clifford, one in the Duke of Devonshire, the other in Lord de Clifford. The Barony of *Strange* is another example of the same kind in England.

According to the principles of the English law, Honours can only have been created in three ways, by tenure, by writ, or by patent. An attempt may be made here to show that there is an analogy between the ancient feudal baronies and the baronies that have since been created in Ireland, and that all feudal baronies went to the heirs male, and therefore, although the feudal principle has ceased, still all those baronies are confined in their descent to the heirs male. We assert that no feudal baronies of Ireland have ever been confined in their descent to heirs male. There exist, from the reign of John, grants of land, held in *capite* of the Crown, and in every case the grant has

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been to the grantee and his heirs. There can be no doubt that at the time of the signing of *Magna Charta*, Baron Fitz-Walter, and Baron Say, and some others, were barons by tenure; but when claims have been made to those baronies, this House has uniformly treated them as the first writs of summons, and heirs general of those barons have frequently succeeded to them; all the earldoms in Ireland before the year 1316 were granted to the heirs of the parties, so that there is not till that year, before which period the Barony of Slane was created by writ of summons, a single dignity in Ireland which descended to heirs male only. All the early patents of the English peerage have been printed, and the result is that the first time heirs male were ever mentioned in the creation of any dignity, was in the instance of the Earldom of *Kildare* in 1316. The next was that of *Louth* in the 12th Edw. 2d, and the third that of the Earldom of *Carlisle*, in the 15th Edw. 2d. The first creation of a baron by patent in England was in 1387, which was also the first instance in England of a barony being created to a man and the heirs of his body. No second instance occurred till 1443. No creation of a baron in Ireland by patent is on record limiting the dignity to the heirs male of the body, until the 2d of Edw. 4th, in 1462, when Sir Robert Barnwall was created. From the Crown downwards, every dignity, from an early period, was granted to the heirs of the persons created, or the heirs of the body.

The case for Mr. Fleming is put on this ground, that because an heir male was summoned on some occasions, and the Crown thought proper in the exercise of its prerogative to put the heir male, the person in possession of the estates of the last peer, into his seat in the House, therefore the dignity must by prescription or some other source be presumed to be confined in its

descent to heirs male. It is true, there is some shadow of pretence for that argument by reason of the fact that the heir male on being summoned did not, as the practice now is, sit as junior baron, but was placed in higher precedence than could belong to the date of his writ. But it appears from the cases that in respect of the sitting of peers in the House there were some places attached to the names of particular dignities, and when any person was summoned to the House by an old title, under whatever right, he took his seat according to the precedence of the ancient Baron of his name. These cases are conclusive that there is no inference whatever to be made from the fact of the Lords Slane sitting in higher precedence than belonged to the dates of their respective writs. On one occasion James the 1st desired the Lord-lieutenant of Ireland to create certain Scotch Earls all Irish Barons, and when so created they were to sit in the House of Peers there as Earls. With such facts, can it be doubted that the prerogative of the Crown with respect to the precedence of peers was never disputed? An act of the Irish Parliament, passed in the reign of Henry 6th, appears to be decisive on the point that Irish peers were then created by writ. There was a dispute between Lords Slane and Gormanston for precedence; Lord Slane had been summoned to Parliament as one of the heirs male of the then last Lord, and from the understanding which then prevailed he claimed precedence of the ancient barony of Gormanston, but it was adjudged to Lord Gormanston, and his barony, it is undisputed, was created by writ. But few, if any, of the Parliamentary writs of Ireland of that period are now extant. It is for Mr. Fleming's counsel to show how a person could have got into the House of Lords of Ireland as a peer without a writ

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having been issued to him. They have the simple fact of those persons sitting, they show no patent, and do not pretend that there was a patent. The principle upon which Mr. Bryan claims is this, that where a patent cannot be shown the same rule of law must exist in Ireland as in England,—the dignity must be presumed to have been created by writ. If, in the case of a creation by patent, the patent itself is evidence of the creation, so is the issuing of the writ of summons evidence of the creation in the other case. If a man is made a peer by patent, he is not bound to show the writ of privy seal which preceded it, or what is termed in Ireland the King's letter; nor are we, on the other hand, bound to show the authority under which the Chancellor in Ireland issued the writ of summons, for the issuing of the writ is the evidence of the fact. In no instance where a barony was claimed at this bar by writ was any other evidence produced than the writ itself, followed by proof of the sitting, from the rolls of Parliament. The close rolls have never been searched, nor the letter to the Chancellor produced authorising him to issue the writ. Until the reign of Henry 6th only one such letter is enrolled on the close roll.

A great deal of weight has been attached to the fact that the heir male(*a*) of William Fleming was called a Baron in certain documents issued by the Crown before a writ had been proved to have issued to him, from which fact it is inferred that the Crown recognised his succession. He is also found so styled in an *Inquisitio Post Mortem*, but it is well known that great laxity prevailed on the part of the Crown, and still greater in inquisitions *post mortem* with regard

(*a*) Christopher, second Lord Slane, of the fourth peerage, in pedigree, p. 35.

to the style of persons. There are now many peers who call themselves barons, and by particular titles, to which they cannot prove a legal right,—to which their right never can be shown; for example, *Earl Pembroke* is called *Lord Wilton*, and the *Earl of Shrewsbury* is called *Earl of Waterford*, but when created, or whence those titles are derived, is not known. It is a laxity which prevailed in innumerable cases, and dignities have been assumed where no such dignities ever existed. The Crown may have intended to create them, but they never were created; so that the mere description of persons by certain titles in ancient documents is no evidence whatever of their right to them. It is well known how in inquisitions *post mortem* similar titles are obtained; and in Scotland how easy it is for a man there to call himself or to be styled an Earl? Then can it be pretended, or is it likely, that more attention would be paid to the subject in a remote village in Ireland in the 17th century?

This claim of Mr. Bryan is founded on the established propositions that the laws of England and of Ireland are the same, except where they are altered by particular statutes; that the dignity of the peerage, whether Irish or English, can only be created by patent or by writ; that all dignities in Ireland for which patents cannot be shown descend to heirs general, not only upon the analogy to such dignities in England, but from the proofs which are and can be put in evidence, if necessary; that in the grant of every title, and in the grant of all lands to which the dignity of a peer could possibly be attached during the feudal system, those grants were to heirs general. If they had been to heirs male, and not to the female branches, and the descents had been limited to the heirs male, there might be something like prescrip-

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tion to be set up, but the prescription is with us; the prescription in every title has, without a solitary exception, been to heirs general, and the Committee is asked to overturn the decision of the House of Lords of Ireland on the *La Poer* Barony (*b*), and to declare that the highest law authorities of that kingdom knew not what they were about in relation to the highest species of inheritance within it; that, in fact, a new law is to be made because the heir male of the Baron of Slane says he ought to be Baron of Slane.

Sir *Charles Wetherell*, for Mr. Fleming:—It is stated in Mr. Bryan's petition that this case was laid before one of the law officers of the Crown in England at a time when the person who has now the honour of addressing your Lordships filled the office of Attorney-General. Upon that occasion, undoubtedly, some investigation was bestowed upon the subject, though not as much as would have been necessary for making a report, but circumstances occurred which prevented a report being made. It did then occur to me, that a mere abstract solution of this question would be an extremely uncertain mode of disposing of it, because if it should turn out that the title has been enjoyed by heirs male ever since the year 1309, has been *de facto* transmitted in a given course of devolution for upwards of five centuries, if this case is to be dealt with on ordinary presumption, it is impossible that there could have been a similar title at the same time in heirs female, or that there would have been two Barons of Slane during all that time;—it would not be a mode of disposing of this question consonant to that great prudence and depth of inquiry which this House is in the habit of bestowing upon all curious

(*b*) 4 Lords' (&c.) Journals, for 1767, p. 420.

and anomalous questions, to say, that there cannot be such a thing as an ancient Barony in Ireland transmitted to heirs male, because according to that abstract proposition (which the counsel for Mr. Bryan lay down), the thing is impossible—according to the old theory of the law of Ireland, according to the old theory of the law of England, one of these ancient Baronies derived from the time of the Edwards must *à priori* be a Barony descending in fee. That is their proposition, and therefore they do not look at facts, nor at usage, nor at anomalies; they do not look at a case of doubt; they do not recollect that in the Parliament of Ireland on repeated occasions this very Barony has been allowed to be a barony descendible to heirs male. They do not look at any of these facts, or doubts, or difficulties, or anomalies, but they solve them all into this mere abstraction, that an old Barony in Ireland must *à priori* be a Barony in fee; and if a Barony in fee, then that a person claiming as heir male never can be entitled to sit while there is an heir female nearer in blood in existence. To that abstraction, and to that theory, we oppose the facts which have occurred ever since the year 1309. If your Lordships look at the case presented by Mr. Bryan, you will find that there may be heirs female claiming under Lord Fleming in the year 1309, other females claiming under Lord Fleming in the year 1462, other females claiming under Baron Slane in the time of Edward 4th, other females claiming under the peerage of 1585, and other females claiming under the peerage of 1613, so that your Lordships will have so many persons claiming to be Barons of Slane that six or seven cross benches must be built up to hold all the peers presenting themselves under this title; for there may be, and probably there are claimants, through females,

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under all these titles from the year 1309. Mr. Bryan's counsel, very able and very quick in their conclusions, say, "Never mind the inconvenience which will grow out of this rule,—whether twenty, thirty, or forty lords are claiming this Barony; that is an inconvenience which you must sustain from the rule; but if it is the law, lay down the law, never mind the inconvenience." To lay down in the abstract that there can be no such thing as an ancient barony in Ireland going to heirs male, is a proposition which it is not easy to comprehend, because as soon as that proposition is laid down, there immediately arises a contradiction to it in fact, namely, that that thing, which the learned counsel tell us never can happen, has happened, and the case which we are now discussing is one in which, *de facto*, for five centuries the title has been so enjoyed. This is not the only case of that sort; there is also the *Kinsale* case (c), in which the House of Lords in Ireland three times decided the same proposition. That case deserves more particular attention, because we have been told that attorneys and solicitors-general in Ireland were not so careful formerly as they are now. But it so turns out that this case of the Kinsale peerage was decided certainly by persons whose decision ought to have great weight, not by persons who may be supposed not to know the law of England, or to whose minds the proposition may be supposed not to have been present, that they were not following the general principle contended for by Mr. Bryan, that whatever is the rule of the Parliament of England the same ought to be, or is, the rule of the Parliament of Ireland; or that what is the common law of ancient peerages in England, the same applies to a peerage in Ireland—a peerage as it were by prescription, a peerage made

(c) 6 Lodge's Peerage of Ireland.

before the ordinary time of making peerages by writ or patent. It happens that this Kinsale case, which was three times under discussion in the years 1627, 1700, and 1762, was on one of those occasions decided by commissioners in England, to whom the matter was referred by King Charles 1st, namely, the Earl Marshal, the Lord President of the Council, the Lord Steward of the Household, and several other persons, who reported to the Crown that the title was enjoyed by heirs male, and ought to be so enjoyed. The next case is that of the *Dunsany* peerage, another strong precedent. When, therefore, it is said that your Lordships are to look at this case merely according to some abstract rule, which abstract rule is, that you must assume an absolute identity between the Parliamentary law of England and of Ireland; and then further assume this second theory, that there could be no such thing in early times as a Barony so created as that it should go to heirs male only; that theory and the abstract rule are contradicted by two adjudged precedents, in which the title so descending was allowed to be a legal descent. Anomalous though it may seem, yet according to the law of Ireland, we have two decisions, and we have in this present case the fact that for five centuries this peerage of Slane has been claimed and enjoyed by heirs male, though there were heirs female who would not have omitted to claim if the course of descent had not been well established against them. It is nowhere laid down that a peerage may not stand upon grounds deviating from the common law. There is no such *dictum*; there is no case in which it is laid down that there cannot in legal theory be a peerage created before patents were used, which may go to male heirs only. There is no rule by which this House is bound to adopt the rule of common law,

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and to say that because lands or offices go to heirs general,—that is, will carry the property of the office to a female,—so will titles of honour also; on the contrary, the whole history of the common law shows that there are numerous exceptions in it from its own rules of descent. Are there not local usages and customs, every one of them anomalies and exceptions from the abstract rules of common law? And therefore there is no reason why there may not be an anomaly in the original creation of a peerage, any more than that there may be customs allowed to break in upon that course, which, upon more general grounds, is the rule of the common law.

But another proposition stated, is, that it must be assumed that there is a perfect identity in the rules of the House of Peers in Ireland with those in England, and it is added that an instance of this sort of descent cannot be produced in England. Assuming that the common law of England is the common law of Ireland, that there can be no anomaly in the House of Peers, nor in the creation of a peerage in Ireland; assuming those two propositions, the learned counsel for Mr. Bryan drew this conclusion, that it must be taken for granted that, what would not be allowed according to the usages of the House of Lords in England, and according to our prescriptive notions on the subject, by a similar rule no contrary usages can be allowed in Ireland. In answer to the theory, stands opposed the fact that the House of Peers in Ireland decided the contrary. Supposing a question should arise upon any Irish statute, and that statute had been, by a decision in Ireland, held to carry a particular meaning, and that construction had been acted upon, and there should be an appeal from it to this House, and the Judges in England should be asked whether

that was the true construction of the statute, it is apprehended your Lordships would say to the Judges, if they were to advise a different construction, “Well, but it has been already construed otherwise in Ireland,—it is *res judicata*.” That is the mode in which we apply the case here. Suppose that this case of the Slane peerage had been an English case, and the Kinsale and the Dunsany cases had been English cases, and the English peers here had said, if this case had come before them, they should have adopted the abstract proposition, that there could be no such thing as an ancient Barony with an anomalous descent,—a descent to heirs male, and not to heirs general; would it follow that, if the Irish House of Peers, an independent House of Peers when the Kinsale peerage was decided, as much so as the English House of Peers, had held otherwise, your Lordships would overrule that decision? Whatever would have been the decision of the Irish House of Lords before the Union,—if it could be shown what that decision would have been,—this House, instead of having an option to deviate from that which would have been the local decision, would by the articles of Union be bound, though sitting in the Imperial Parliament, to decide a question of Irish peerage just as it would have been decided in Ireland.

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The *Lord Chancellor*:—Suppose before the Union a question on a claim of peerage had arisen in Ireland, and a committee of peers there was sitting upon that question, would you say that such a case, as the Clifford case, for instance, which is the leading decision here on these questions, would have been citable by counsel before the Committee of Privileges in the Irish House of Lords? In a case with respect to a peerage in Scotland, it is quite clear that an English decision could not have been cited in the Scotch Par-

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liament, nor could a Scotch case conversely have been cited here on a question of English peerage.

Sir *Charles Wetherell*:—Such case could only be cited by way of illustration. In the Anglesey peerage, after the House of Lords here had decided against it, the House of Lords in Ireland decided for it, which shows the great difference of opinion that may be come to on the same state of facts. When your Lordships will have heard from my learned friend Mr. Lynch, who is also counsel for Mr. Fleming, the history of this very singular case, your Lordships will be of opinion that it is utterly impossible to imagine such a case of negligence and of non-claim on the part of the heirs female; that it is impossible that this usage could have passed *sub silentio*, or in so careless and inattentive a manner, as that this succession for five centuries has been as it were a usurpation practised by the Crown, or a usurpation practised by the heirs male in having *de facto* enjoyed the peerage during that long period of time. We admit none of those general propositions which the counsel for Mr. Bryan contend for, and yet it is on generalities of this sort that your Lordships are called upon to shut out the actual descent of this peerage, and to solve all difficulties in the question which, while you are solving, you entirely overrule the independency of the Irish House of Peers, because, according to the argument, though there were twenty instances of old peerages going to heirs male, the gentlemen on the other side still would say, “There never was one in the Parliament of England; and though there are ten or twenty in the Parliament of Ireland, they are decisions in their own House, and the decisions of an independent House of Lords are to go for nothing!” That proposition is not to be admitted, it is only by

looking at the history of this peerage that your Lordships can come to the conclusion whether the claim is or not sustainable, precisely upon the same grounds as other rights and other peerages have been claimed and admitted in the Parliament of Ireland previous to the Union. If this question had, before the Union, come before the Parliament of Ireland, there could be no reason at all for holding that that which has been done in two undoubted precedents, should not be also done in this case.

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[Adjourned *sine die*.

The Committee of Privileges having again met, July 9, 13, and 15.
 after a lapse of three years,

Mr. *Lynch*, for Mr. Fleming, stated shortly the history of the proceedings on the petitions of both claimants, and that the Committee agreed, after hearing the Attorney-general's statement, that Mr. Fleming might appear at the Bar of the House, and give evidence on his claim; and also, that he might state his case as to the descent of the peerage. That course of proceeding was agreed to, with the consent of the Counsel on both sides—

Lord *Brougham* :—With consent of the Crown; and that we should hear him, not so much abstractedly as a claimant referred by the Attorney-general to the House, but *quasi* opposing the claim of Mr. Bryan; and should that claim be excluded, still Mr. Fleming shall have to go back to the Attorney-general for his report.

Mr. *Lynch* :—Just so. The question which comes before your Lordships is the most important that ever

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was raised in relation to the peerage of Ireland; upon it depends the right of all the ancient Baronies of that kingdom, except that of Lord Trimbleston. Your Lordships are called upon to decide whether these ancient Baronies shall continue to vest in the ancient families by which they have been enjoyed for so many centuries, or whether they are to be deemed Baronies in fee tail, descendible as such through female heirs to new families, and sub-divided in the course of descent into as many Baronies as there have been exclusions of heirs general in the course of the descents. Thus, in the Barony of Slane, by the evidence upon your Lordships' table, it appears that female heirs were excluded from the succession in 1457, in 1471, in 1576, and in 1597; and the present claim to that dignity as a Barony in fee is made by a gentleman, who claims to be one of the heirs general of a Lord Slane who died in 1726, leaving a daughter his sole heiress surviving. The question, therefore, which your Lordships are now called upon to decide is, whether there are five Baronies of Slane descending as Baronies in fee tail, or one Barony of Slane descendible in tail male.

A similar question arises with respect to other ancient Baronies of Ireland, the number of Baronies to be revived by the decision, which my learned friends call upon your Lordships now to come to, depending upon the number of exclusions of heirs general in the course of descent, in each and in all of those Baronies. But the doctrine upon which the claim of Mr. Bryan is brought forward will, if established, not only have the effect of producing five Barons of Slane, five Barons of Kinsale, three Barons of Killeen, three Barons of Howth, and so on, but will go much further; for the peerage of Ireland, until the reign of James the First, when the rupture took place between that mo-

narch and the House of Lords of Ireland in 1613, consisted of a very small body, never exceeding twenty-five peers. But although the number of peers was small, yet many individuals were from time to time summoned to attend the Parliament; they attended and sat in Parliament, but it was never considered that any of them obtained a peerage by that summons and sitting; they never thought of claiming peerages, and whilst they were there sitting in Parliament by virtue of the summons, they were still considered commoners. But should the decision in this case proceed on the grounds urged on behalf of Mr. Bryan, it may have the effect of inviting many claims to peerages from the descendants of those commoners who were summoned to the House of Peers, but on whom it was never intended to confer the dignity of the peerage. It is thus rendered impossible to estimate the extent to which this decision may lead; at the same time we cordially agree with the proposition urged on the other side, that whatever the effect of your Lordships' decision may be, although it would have the effect of creating a great number of Baronies out of the ancient Baronies of Ireland, yet the law must take its course. But it shall be our duty to endeavour to protect the peerage of Ireland from such an inundation; and to prove that the law of Ireland not only consecrates the rights of the noble families to those ancient Baronies which they have enjoyed for so many centuries, but that that law is altogether in opposition to the doctrine, now for the first time advanced, of the creation of ancient Baronies in Ireland by writs of summons and sitting.

There are ten other Baronies similar to that of Slane, and to them may be added three others very ancient, but now merged in the Earldoms of *Kildare*,

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Ormonde and Desmonde. The ancient peerage of Ireland is composed of those fourteen; every other peer of Ireland owes his title to letters patent only. The time or manner of the creation of those fourteen ancient peers we are unable to discover, being lost in that obscurity which veils our remote history; most of them may be traced to the first establishment of the English sway in Ireland. They rose with the rise of Parliamentary authority, being coeval with the Parliaments of Ireland; it is therefore in the proceedings of those Parliaments, in their judgments, in their acts, in their admissions, that we are to search for the laws which regulate the peerage of Ireland. It shall be made to appear, that by a continuous chain of proceedings in those Parliaments, and by a constant usage, which has prevailed in these Baronies themselves, the descent has never varied from the male line. This usage is admitted, and cannot be controverted, but there is an attempt to supersede it by English usage, introduced at a comparatively late period, and now brought forward for the first time, notwithstanding the contrary usage already mentioned, and all the diversities which existed for so many years between the constitutions of the two Parliaments and the state of the two kingdoms.

In the case of Viscount Purbeck (1678), in the Peerage printed Cases, the Earl of Shaftesbury says, "As to Mr. Attorney's second assertion, viz. that honours are to be governed as other inheritances, and by the rule of the common law, it is contrary to the opinion of the most learned men, the honour and dignity of this House, the practice of the Courts in Westminster Hall, and the direct evidence of the thing itself. Justice Berkeley, a very learned Judge, declared his opinion, *February* 6th, 1640, as appears by the

records of this House, that honours must descend from the first that was served of them, contrary to the rules of other inheritances; and that they are not governed by the rules of common law. Judge Doddridge (in Jones, 207), is of opinion that honours are personal dignities, which are fixed in the blood. The Lords never yet suffered those honours to be tried at any court of law or any other place, save before themselves, though their other inheritances are tried there as well as other men's(*d*).” That is the doctrine that we desire to establish in this case, and having thus from high authority shown that the common law can in no way interfere with the descent of peerages, we are quite willing to admit that the common law of England was introduced into Ireland by King Hen. 2, and that it was in full force in the reign of King John, as appears by the records in the Tower and in Ireland, the earliest of which appear to be in the time of Edw. 1; but the admission of that fact cannot serve the other side, unless they show that at that period the law of the creation of Baronies by writ and sitting was the law of England. If that was not the law of England at the time, and if the common law, either as to other inheritances, or as to peerages, was introduced into Ireland by Henry 2, Mr. Bryan must make out that the law of creation of peerages in Ireland at that period was by writ of summons and sitting; for if he does not, the argument avails him nothing, as no subsequent law, or alteration in any law, could be introduced into Ireland after that period, except by the authority of Parliament. That was stated over and over again, and insisted upon by the Legislature of that country; and by the statute 38 Henry 6, c. 6, it is declared, that

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(*d*) Collins, 297, and Show. P. Cas. 5 et seq.

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“Ireland is, and ever has been, corporate of itself, and of the ancient laws and customs used therein;” and by another Act of the same year, that “Ireland is free and separate from all laws and statutes of England, save those which have been freely accepted in Parliament or Great Council, by the Lords Spiritual and Temporal, and the Commons.” There is a case in the Year Book, 20 Henry 6, fol. 8, *Pockington’s case*, in which it was decided, upon a demurrer before the English Judges, that Ireland was a land separate and distinct from England, and governed by the customs of the said land.

Having shown to your Lordships, upon these authorities, that Ireland was a separate kingdom, governed by her own customs—having admitted that the common law of England was introduced into Ireland by Henry 2—having called upon Mr. Bryan’s counsel to show that by the law of peerage, which then existed in Ireland, baronies might have been created by writs of summons and sitting—which is what they cannot do,—I will now state, from the Report of the Lords’ Committee on the Dignity of a Peer, a few extracts to show that the creation of peerages by writ, and their descent to the lineal representatives of the persons summoned, were unknown to the law of England for centuries after Henry 2. In the Third Report, they say, that before the time of Richard 2, a writ of summons to Parliament, and a sitting in Parliament under such writ, were not considered as giving a hereditary right to the descendants of the persons so summoned; and that probably this rule of law, as it may now be considered to be, was not adopted until long after the reign of Richard 2—

Lord *Brougham* :—That is the opinion of the Committee, but it is not decisive; it is very much questioned. Lord Redesdale was the author of that report, and his theory on the subject of peerages has been matter of controversy among lawyers and antiquaries; it is very ingenious, but subject to great difference of opinion.

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Mr. *Lynch* :—The report is cited as of grave authority, not as decisive. No writ of summons can be discovered before the reign of Henry 3; the first was in that reign. Another passage in the Fourth Report, p. 341, says, "Letters patent state the extent of the grant which they create." Then at the end of that paragraph, "it seems only to be an inference of law, derived from usage, which has extended the operation of a writ of summons beyond the person to whom it was directed." There is another passage, the last paragraph in that page. "Before the decision in the *Clifton* case, made in 1673, the law cannot be deemed to have been clearly settled, but on what ground the Judges gave their opinion that the honor descended from Jervas Clifton to his daughter and heir, does not clearly appear; and if they had before them all the cases in which the heirs of a person summoned had not afterwards been summoned, they must have conceived that those heirs had been unjustly deprived of their right of inheritance, unless they fixed upon some point of time when they considered that usage had created a new law upon the subject." The opinion of the Committee, therefore, was, that this creative effect of writs of summons was not considered settled law until 1673, as appears by the *Clifton* case, and that it only referred to the usage from a certain period, which they fixed at the time

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of Richard 2. If that opinion be correct, this creative effect of the writ of summons was not the law of England in the time of Henry 2, which he introduced into Ireland, as the common law of England. The Clifton case gives the law, but the Lords' Committee say, that they have found out in their research that writs of summons were from time to time sent to individuals; that those individuals sat, but that their descendants were never afterwards summoned; that the writ of summons was merely personal; that until a certain period, it was not considered as having a creative effect; they have fixed upon a period, and that was the reign of Richard 2.

Lord *Brougham* :—Then you mean that you considered their Lordships' report as saying the law of peerage was changed about the time of Richard 2; that there was one law of peerage before and another after. I do not understand how the common law can have changed without statute.

Mr. *Lynch* :—Usage may change. They say before that time the writ was merely personal; that the individual was summoned, but that his descendants were not; that another usage then sprang up; and that, if an individual was once summoned, his descendants were afterwards summoned. They can trace that usage no further back than Richard 2. Their Lordships say, that they have found several instances where writs of summons had not a creative effect. *Magna Charta* directed all the tenants in chief to be summoned to the House of Lords, therefore some change must have taken place in the legislative assemblies after that period. After the time of King John, there was a change effected, not by Act of Parliament. A similar

change might be effected with respect to writs of summons, and that is our position; if a change could be made in the legislative assemblies after the reign of King John, and after *Magna Charta*, it is not unreasonable to suppose that another change might be effected with regard to writs of summons.

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The courts of common law cannot decide a case of peerage. It appears from Calvin's case^(e), that the Court of King's Bench could not take any original cognizance of an Irish dignity. Lord Coke there says, that "a man who is not a peer, or one of the nobility to serve in the upper House of the Parliament of England, is not in the legal proceeding of the law accounted noble within England; and therefore if a count of France or Spain should come to England, he should not here sue or be sued by the name of count, for he is none of the nobles that are members of the upper House of the Parliament of England; and like it is for the same reason of an Earl or Baron of Ireland, he is not any peer of the nobility of this realm." An Irish Earl or Baron was only an esquire in this country. In a writ of error brought from the King's Bench in Ireland to the Court of King's Bench in England, the court here was bound to decide the case, not according to the law of England, but according to the law and custom of Ireland. In another case, the Lord Sanchar's case^(f), the judges laid down thus:—"Then it was asked how the Lord Sanchar, being an ancient Baron of Scotland, should be tried, and it was answered by them that none within this realm of England is accounted a peer of the realm, but he who is a Lord of the Parliament of England; for every subject either is a Lord of the Parliament or one of the Commons." The Court of King's Bench could have no jurisdiction except as a

^(e) 7 Co. Rep. 29.

^(f) 9 Co. Rep. 117.

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court of appeal, as a court of error, and therefore must have decided according to the laws and customs of Ireland. It appears from the *Coram Rege* roll of the 4th and 5th of Ed. 1, that as early as that reign an Irish Act of Parliament was pleaded and admitted, on error, that denied the right at all of the common law to interfere in those cases; and even the House of Lords of Ireland, in the case of Lords Anglesey and Valentia, decided differently from the House of Lords in England: and it appears by the memorandum roll of the 10th and 11th of Eliz., that John Burke claimed the Earldom of Clanricarde, alleging the illegitimacy of the person in possession of that dignity, and besought the Queen that he might be called upon to prove his right before her Majesty, but she ordered him to “depart into Ireland; and because the Earl was in quiet possession of his title, and was a good subject and servant to the Crown, that he should not be molested to come hither, but should answer according to the form of law of that realm provided to the demand of the said John Burke, to whom no benefit of the law should be denied.”

It now becomes necessary to state to your Lordships the difference between the descent of the ancient Baronies of Ireland and the descent of the ancient Baronies of England. Taking the twelve most ancient Baronies of England, we find they have changed names, and have gone into different families at different times; and this curious fact occurs, that in respect of one, that of *Willoughby de Broke*, by the several families who have enjoyed it, it has not been enjoyed by any of them for a longer period than sixty or seventy years. In the ancient Baronies of Ireland there is what may be considered an invariable enjoyment in the same family and by the same name. What conclusion can be

drawn from that comparison, but that a different law prevailed in Ireland as to those ancient Baronies from what prevailed in respect of the ancient Baronies of England? (Taking the twelve ancient Baronies in England, the learned counsel compared them with the ancient Baronies of Ireland (*g*), singly and separately,

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(*g*) The following Table exhibits a Comparative View of the descent, as described by the learned Counsel, of the Twelve Ancient Baronies of Ireland, and of an equal number of the Baronies in fee-tail of England, from the reign of Henry 7 to the present time, showing the Families by which they were then possessed, those through which the latter have since passed, and those in which all of them are now vested.

IRISH BARONIES.	ENGLISH BARONIES.
1. Athenry. Birmingham.	De Roos. Manners, Cecil, Villiers, Willoughby, Jones, Conynsby, Williams, Boyle, Fitzgerald.
2. Kingsale. De Courcy.	Le Despencer. Neville, Fane, Dashwood, Paul, Stapleton.
3. Offaley. Fitzgerald.	De Clifford. Clifford, Sackville, Tufton, Coke, Watson, Southwell, Cousmaker, Russel.
4. Arclow. Butler.	Andley. Touchet, Thicknesse.
5. Buttevant. Barry.	Clinton. Clinton, Boscawen, Fortescue, Rolle, Walpole, Trefusis.
6. Kerry and Lixnaw. Fitzmaurice.	Dacre. Fiennes, Lennard, Barret, Roper, Brand.
7. Gormaston. Preston.	Zouche. Zouche, Tate, Hedges, Bishopp, Curzon.
8. Slane. Fleming.	Willoughby d'Eresby. Willoughby, Bertie, Burrell.
9. Delvin. Nugent.	Willoughby de Broke. Willoughby, Greville, Verney.

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and proceeded.) How did it happen, that, with respect to those twelve ancient Baronies of England, there had been this constant change of name and enjoyment, and that, on the other hand, from the reign of King Henry 6 down to this day, all the ancient Irish Baronies continued vested in the same names and families that first enjoyed them? Out of those twelve ancient Baronies in England, nine of them have at certain periods been enjoyed by females. None of those ancient Baronies in Ireland were ever enjoyed by a female. Not only were they not enjoyed by females, but in numerous instances with respect to those Baronies, and particularly with reference to the Barony now under consideration, the females were passed over, not in ignorance of their existence, but with full knowledge of it, and with a full acknowledgment of

IRISH BARONIES.	ENGLISH BARONIES.
10. Killeen. Plunket.	Grey de Ruthyn. Grey, Longueville, Yelverton, Gould, Rawdon.
11. Howth. Saint Lawrence.	Howard de Walden. Howard, Griffin, Whitwell, Felton, Hervey, Ellis.
12. Dunsany. Plunket.	Stafford. Stafford, Howard, Plowden, Jer- ningham.

To these Irish Baronies is to be added the Viscounty or Barony of Fermoy, which has always vested in the family of Roche. It may be contrasted with the English Barony of Clifton, which has been enjoyed by the families of Clifton, Steward, O'Brien, Hyde, and Bligh. The Fermoy Peerage is circumstanced in exactly the same manner as that of Buttevant. The Barony of Offaley is now vested in the Duke of Leinster; that of Arclow in the Marquess of Ormonde; that of Kerry in the Marquess of Lansdowne; that of Gormanston in the Viscount Gormanston; that of Delvin in the Marquess of Westmeath; that of Killeen in the Earl of Fingal; and that of Howth in the Earl of Howth.

the rights to which they were entitled, in the Parliamentary records, in which the title of heirs male was acknowledged in exclusion of heirs general.

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What, then, became of the doctrine, that, because Baronies by writ had existed in England, and because the usage in England was that they should descend to heirs general, that usage should be extended to Ireland, in opposition to what had been the invariable and constant usage of that country? The invariable rule with respect to English peerages is, that they who claim by writ of summons are bound to make out their titles by the style mentioned in the writs. The claimant to this Barony of Slane has produced but one writ of summons, and that is the writ in which *Baldwyn le Fleming* was summoned, and from that *Baldwyn le Fleming*, as he alleged, the Barony first arose; yet he does not claim the title of *le Fleming*, but the title of *Slane*. In the case of *Longueville*, when claiming the Barony of *Grey de Ruthyn*, it was decided by the House that it was necessary for him to claim the same title as was mentioned in the writ of summons(*h*). Mr. Bryan does not claim that title; he claims by writ of summons, and does not claim to be heir general of this *Baldwyn le Fleming*, for he is not heir general. In every case of a claim to a Barony by a writ of summons, it is necessary to claim through the person first summoned. There is another distinction between the law of England and Ireland in this respect. The law of England is, that a claimant is bound to make out the title to the person first summoned. In the two ancient Baronies in Ireland of *Kinsale* and *Dunsany*, the decision to which the House of Lords came was, that it was only necessary to make title to the person

(*h*) Collins on Baronies, 195.

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last seised. Why ? Because they were Baronies in tail male. Those are two most important distinctions, and that is the law laid down by the House of Lords, where the point was controverted, and where the decision was in favour of the heir male, and it was necessary only to state in the petition, and to prove that the dignity was enjoyed from time immemorial, then to prove the enjoyment by the person last seised, and prove the claimant to be heir male of that person.

An important difference between the two Parliaments of England and of Ireland was, that the Parliament of England was summoned by the monarch : he was the power summoning, and he is the only power that can ennoble. In Ireland, Parliaments were not summoned by the monarch, but by the Lieutenants, by the deputies of those Lieutenants, and by the justiciaries appointed by the nobles of the land. If all the constitutional authorities that have written upon the subject be correct, that no power in this kingdom, except the monarch, can confer nobility ; if that be the law of the constitution, what avails the argument, that because Lords-lieutenant or their deputies, or the justiciaries in Ireland might summon Parliaments there, they had the power of ennobling the persons so summoned ? Maddox in his Bar. Angli. p. 23, states, that the King is *fons justitiæ et honoris* to his subjects ; that it is so agreed in the courts of law and of chivalry ; that no man or number of men, without the King, can or ever could make an Earl or Baron ; that to grant a Baronial title is an act of regality inseparable from the crown, and incommunicable to subjects, that is, never was communicated ; that when land Baronies existed in England, a man could not purchase an Honor or Barony (as that of Arundel), without the King's consent, but there must

have been a licence to the grantor to grant, and to the grantee to take such Honor." It cannot be denied that the Lords-lieutenant and their deputies, and the justiciaries, and the governors, elected by the peers in Ireland, had, down to the passing of Poyning's Act, in the reign of Henry 7, the power of summoning Parliaments, originally at their will and pleasure, but limited to one Parliament in the year in the reign of Henry 6; and that power was often exercised by them in opposition to the King's wishes. The power was recognised by Acts of Parliament, and the exercise of it is matter of history, and amply testified by the documents in evidence. It is not to be supposed that a Lord-lieutenant or other governor, summoning a Parliament against the King's will, had also the power of ennobling the persons so summoned. Yet Mr. Bryan's case rests upon that supposition.

All the Baronies in Ireland, except the twelve before enumerated, were created by letters patent, none at all by writ. The most ancient writ of summons extant in Ireland is the general writ summoning the Parliament at Kilkenny, in the reign of Edward 2. And it is stated upon the roll from which that writ is taken, that *consimilia brevia mandata fuerunt diversis prelatiis et aliis proceribus et HOMINIBUS in terra Hyberniae*. And there also appear the names of eighty-seven persons who were then summoned and who accordingly attended. That persons who were neither peers or prelates were so summoned, is evident, not only from the words *aliis proceribus et HOMINIBUS*, but also from another passage in the same roll in old French, that *Prelaz, Countez, e Barouns e AUTRES BONS GENZ de la comuniaute* were commanded by summons to attend. The words could not apply to the Commons, because they attended not by

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summons, but by election ; yet not one of those eighty-seven nor of their descendants ever claimed a peerage by virtue of that summons and sitting. If the Lord-lieutenant had the power of ennobling the persons whom he summoned to Parliament, most certainly these *autres bons genz* would not have omitted to claim the dignity of the peerage. That a similar usage prevailed in the time of Edward 1, appears from *The Black Book*, a very ancient book, preserved in Christ Church, Dublin, in which summonses are recorded to have been sent to the Earls, Barons, *et aliis optimatibus*. In the ordinance of Edward 3, *pro statu Hiberniæ* (printed in the Appendix to the 9th vol. of the Statutes, ed. 1765), is this passage : “Also we will and command that the affairs of us and of our land &c., shall in council, by our sage councillors, and the prelates and great men, and certain of the *more discreet and lawful men* (*discretioribus et probioribus hominibus*), of the parts adjoining where these councils shall happen to be holden, for that cause to be called to Parliament, &c., according to justice, law, custom, and reason, be treated of an approved.” Several ancient documents, put in evidence, show that in the reigns of Edward 3 and Richard 2, several persons besides the ancient Barons were summoned to attend in Parliament, and neither they nor their descendants ever claimed to be peers. There is a letter from the Lord-deputy and council in Ireland, to Henry 8, on occasion of his obtaining the title of King of Ireland (1541), giving the names “of all such lords, both English and Irish, as were present, and gave their liberal consents thereunto.” Among the names were those of seven chieftains, with the words, “*isti nondum sunt de Parlamento*” annexed. Some of these were afterwards ennobled by letters patent. But

it appears quite conclusive from some letters by Lord Audley, Lord Chancellor of England, to Secretary Cromwell, in the reign of Henry 8, and from a letter by Henry himself to M^c. William, and from other documents published lately among the State Papers, that the old course of making Barons in Ireland was by letters patent out of Chancery in England, generally in pursuance of a recommendation from the Lord-lieutenant in Ireland, or by the King's privy-seal letter to the Lord-lieutenant. The Crown always evinced the greatest jealousy of the prerogative of creating peers in Ireland, and even letters patent were from the earliest period granted with the greatest caution. The *Le Poer* Barony, the only case cited for Mr. Bryan, was created by letters patent, as appears in a letter from Lord Audley, dated September 1536, in which he writes: "I have also made two patents for two Barons in Ireland, Sir *Richard Poer*, knight, and *Thomas Eustace*, gentlemen; Cowley (clerk of the Crown) showed me that the old course to make Barons there is to have letters patent out of the Chancery here in England, wherefore I have made and sealed the same patents, and send them unto you for speed of the dispatch of Ireland's matters, &c." By that patent, the limitation was to heirs male of the body of that *Richard Poer*. He sat in Parliament the 33d of Henry 8, and afterwards in the Parliament of Elizabeth, according to the precedence of a Baron of Henry 8; and the *Le Poer* Barons continued to sit in that precedence down to the reign of Charles 1, when Richard Lord Le Poer was created Earl of Tyrone, and he was succeeded by his son and grandson, and his grandson died in 1704, leaving a daughter, who was the wife of Sir Marcus Beresford, one of the most influential of the dominant party at

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that time in Ireland. On the death of the third Earl of Tyrone, the Barony descended upon John Poer, who had been outlawed for treason, and his son Henry Poer claimed the estates, and preferred a petition to the King for leave to go before the commissioners then appointed to adjudicate on such claims. Sir Marcus Beresford and his wife, who were in possession of the estates, immediately petitioned the House of Commons, setting forth "that James, late Earl of Tyrone, devised his estates to his daughter, Lady Catherine Beresford, after her brother's death; and that Henry Poer, son of John Poer, commonly called Lord Poer, under pretence of being next heir male of the said Earl, hath, upon petition to His Majesty, obtained an order of reference for inquiring into the said Henry Poer's title to the said estate, not having taken notice in his petition of the attainders of his grandfather and father for the rebellions of 1641 and 1688, and that such attempts may prove dangerous to the Protestants of this kingdom, &c." In consequence of that petition the House of Commons addressed the King (Wm. 3), praying him to withdraw this order of reference, and the King did withdraw it, but allowed Henry Poer 300*l.* a year; and the Commons' journals show that that pension was paid to him for a number of years as Henry "Lord Poer" in some instances, and in others as "Henry, commonly called Lord Poer." It was not till twenty years after the death of this Henry Poer, and sixty years after the death of her father, that Lady Catherine Beresford presented her petition for the dignity. That petition was presented on the 9th November 1767, ordered to be taken into consideration the Monday following, brought on on that day, and upon that day it was decided that she made out her case. The resolution

of the House of Lords does not state upon what grounds they proceeded, whether they inquired as to the time or mode of the creation of the dignity, or how this Lady Poer became entitled to it. The only title which she herself asserted in her petition was, that her grandfather and father sat in the House of Lords, and therefore she was entitled; and the resolution of the Lords says, "That she has made out her case." That case so decided was cited as an acknowledgment by the House of Lords of Ireland of the doctrine that a writ of summons and sitting were sufficient to establish a claim to an Irish Barony, though there is not a word about a writ of summons in the whole of the proceedings. If such a claim were made here, your Lordships would never have been satisfied with the allegation that a claimant's father and grandfather sat, but would have inquired into the creation of the dignity, and if it was by writ of summons you would have required that writ to be produced, and the claimant to deduce title from the person first summoned.

The English peerage cases referred to ought not to be cited as precedents to regulate the descent of ancient Irish Baronies; but even if citable, they would not support the doctrine contended for, as they are anomalies and exceptions from the general rules of descent of English peerages. They are the cases of *Abergavenny*, *Percy*, *Berkeley*, *Montagu*, *Stafford*, *Clifford*, *De-la-Warr*, and *D'Eincourt*. The three first have been considered Baronies by tenure, and the precedence given to them must have been owing to that idea. The fourth, Lord *Montagu*, was the eldest son of Margaret Countess of *Salisbury*, and being restored by Act of Parliament to his rights, he was placed in the Barony of his mother. The *Stafford*

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peerage depended on the construction of a particular Act of Parliament. Lords *Strange* and *Clifford* were the eldest sons of the Earls of *Derby* and *Cumberland*, and were called up to the House of Lords in the year 1628, upon a supposition that the Baronies were not merged in the Earldoms. *De-la-Warr* was an ancient Barony. Thomas, who enjoyed it, obtained an Act of Parliament depriving his nephew of the right of succession. Afterwards this nephew was summoned and obtained a new peerage, and he left a son, who claimed the old peerage as well as the new, insisting that the Act of Parliament was merely personal to his father. The *D'Eincourt* case depended upon the question whether a Barony could be alienated or passed by conveyance. These cases were not more applicable to the present than the single Irish case that was cited. But while Mr. Bryan endeavoured to regulate the Irish peerage by the anomalies in the English peerage, he forgot that he was violating the English doctrine respecting peerages by writ of summons and sitting. He produced only one writ of summons, and from that created five distinct Baronies. The law, in all claims of Baronies in fee-tail by writ of summons, was, that the title claimed must be conformable to the style and dignity contained in the writ. The writ produced in the case was directed to *Baldwin Lord Fleming*, but Mr. Bryan did not claim that dignity, but the dignity of Lord *Slane*, which, according to the case and argument for him, was a new and distinct peerage, but for which no writ of summons could be produced. He claimed as heir general, not to the person first summoned, but to a peer who sat in the reign of James the 1st. (Mr. *Lynch* proceeded to state, that to all the ancient Irish Baronies before-mentioned heirs male always succeeded, to the ex-

clusion of heirs female, and he produced from public documents instances of such succession, sometimes after a contest on behalf of the females, in the Baronies of *Kinsale*, *Buttevant*, *Killeen*, and *Dunsany*, and then he stated the pedigree of the Lords *Slane*, from the first creation of that peerage, about the time of Henry the Third or the first Edward, showed that on five different occasions in the descent of that dignity remote heirs male succeeded to the exclusion of daughters and sisters of the deceased peers, and that on the last of those occasions a daughter, sole heiress, made no claim to the dignity, although she prayed for and received a pension of 50*l.* a year, while the remote heir male received a pension of 300*l.* In this deduction of the peerage, he insisted that there was only one Barony of Slane ever created; that there was no abeyance at any time. He said he believed he might have rested his case on the five exclusions of females, as establishing the usage in this particular Barony; but he thought it right to extend his argument, in order to give a complete answer to the case of Mr. Bryan, that this was one of five different Baronies, that the fifth was a Barony by writ, and descendible to females—a doctrine not warranted by the descent of the ancient Baronies of Ireland, nor by the history and facts of this case. He felt, therefore, that he was bound to show the Committee the diversity of creating peers in England and Ireland, the diversity of the constitution of the two Parliaments; to show that the common law of England, or of the descent of the English peerage, as at present established, had no effect on this question, and that the doctrine of creation of peers by summons and sitting did not prevail in Ireland; and in support of his arguments generally, he read the observations of

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one of their Lordships in moving the judgment of the Committee of Privileges in the Devon Peerage case.)

Lord *Brougham* :—My Lords, this case has been very fully and with distinguished ability argued by the learned Counsel, not so much on behalf of Mr. Fleming, for whom he appears, as against Mr. Bryan, the other claimant. If your Lordships are convinced that this is not a Barony in fee tail—whether we go into the general question of Baronies in fee tail or restrict our consideration to the Barony of *Slane*, which may be sufficient for the purpose—if your Lordships should come to the conclusion that it is a Barony limited to the heirs male, whether by original patent or by writ of summons to the heirs male of the body, instead of heirs generally, then there would be an end of the case of Mr. Bryan, whether Mr. Fleming proves his case or not. It would still remain for Mr. Fleming to bring forward his case, and to show his right by direct evidence or otherwise.

Generally speaking, your Lordships do not in these cases give a reply to the claimant. A reply is not given after the Crown. The Crown is here to assist your Lordships, as the Attorney-general assists, as assessor to the Privy Council; nevertheless, there the Attorney-general, as assessor, is allowed to be replied upon; and we should in an extreme case—being only in pursuit of truth—allow the other claimant to have the last word, giving always the last word of all to the Attorney-general. But it is somewhat different to a counter claimant, and the rule is not so strict, the object being to assist the consciences of your Lordships; and it is very desirable, as my noble and learned friend(g) has not heard the whole of the

(g) Lord Lyndhurst.

arguments, but only Mr. Lynch's arguments of the two last days,—which, however, comprise the whole of the case,—and as my noble and learned friend and I are of opinion that he has made a great way in his case,—for we both feel, and your Lordships, who have attended the whole of this case, must feel, that the impression is very strong in favour of this negative argument, that this is not a Barony in fee tail,—what it may be is another question ;—under those circumstances, I think it but fair we should hear what the claimant, Mr. Bryan, has to urge, not in order to set up his original case, but to repel the inferences drawn, or supposed to be capable of being drawn, from the argument of Mr. Lynch. We both, therefore, strongly recommend your Lordships to take this course, to call upon Sir Harris Nicolas or Sir William Follett, who is his leader, and as Sir Harris Nicolas declines doing it now, having been surprised by the case being brought on to-day, we shall either give him or his learned leader (that is for their arrangement) the opportunity of being heard the next time we take up this case. But, in that case, it should be understood what is meant by a reply ; the object being not to restate the case by the same Counsel or another Counsel, but a reply is to displace the arguments urged *de novo* on the other side against your case. The Court of King's Bench always stops Counsel if they pursue any other course. It is not so in Chancery, but it ought to be, and we adhere to it as a wholesome practice in this House. The reply is to be strictly a reply ; Sir Harris Nicolas will take care of that.

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Sir *W. Follett*, in reply, admitted the importance of the question to the peerage of England as well as

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of Ireland ; for if their Lordships should adopt the arguments urged by Mr. Lynch in disposing of this case, the titles of several Peers sitting in this House, by virtue of ancient Baronies, must be shaken and exposed to danger.

It being not contended on either side that this is a Barony by tenure, it must therefore be a Barony created by writ of summons or by patent. If created by writ, then there is a known rule of law applicable to it ; if by patent, the persons answering the description contained in the limitations of the patent, and producing it, can have no difficulty in establishing their right to the Peerage. In the very powerful argument addressed to their Lordships by Mr. Lynch, he nowhere stated that his client claims by writ or by patent ; he said that whoever can make out his title as heir male of the original grantee of the dignity will have a preference over the heirs general, and he alleged that there has been a particular usage in a long course of descent.

Lord *Brougham* :—I paid the utmost attention to the very able argument of Mr. Lynch, and as at present advised, I do not think we shall be called upon to decide the general question, whether there is or not in Ireland a Barony in fee. That is a point which has been indirectly pressed upon us for decision on the part of Mr. Fleming. It will be sufficient for us to look at the history of this Barony. What creates the difficulty of your case is this—here is descent after descent carried to remote males, there being nearer females ; for instance, *A* dies without male issue, but leaving daughters ; the Barony is not in abeyance, but goes to his cousin *F.*, and *F.* dies leaving one daughter, and she does not inherit

the title, but it goes to *G.* a cousin ; and in one remarkable instance the lady, a daughter, left in very poor circumstances, got fifty pounds a year as pension, not to support the dignity, but to keep her in bread, whereas the male relation got the title and a pension of three hundred pounds a year to support his dignity. Is there any difficulty in presuming a lost patent to heirs male ?

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Sir *W. Follett* :—That is impossible ; there was no creation of a Barony by patent in England or Ireland at the time when this Barony existed. But in very early times, all dignities and offices were by writ granted to a man and his heirs generally. There is no instance of a writ being issued to a person to attend in Parliament, mentioning the line of descent. The writ is a personal summons to the individual to come and take his place among the Peers of the realm, and the issuing of the writ and the sitting have been declared to have the effect of creating an hereditary dignity. Lord Coke says, “ When a man is called to the Upper House of Parliament by writ, he hath an inheritance therein without the word heirs, yet may the king limit the general state of inheritance, &c. to the heirs male or general of his body by the writ, as he did to *Bromflete*, who in 27 Henry 6 was called to Parliament by the name of the Lord *Vescie*, with the limitation in the writ to him and the heirs male of his body.” Co. Litt. 9 b. The earliest creation of a Barony by patent in England, was that of John Beauchamp, of Holt, Baron of Kidderminster, 11 Rich. 2 ; the earliest patent creating a Baron in Ireland was in the time of Edw. 4 ; Barons in earlier times were created by writ, and the only course of descent then known, in all the countries of Europe,

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was to heirs general. Lord Coke says, a man may have a title of nobility by prescription, Co. Litt. 16 b. But that point was much discussed in this House in the case of the *Arundel* Peerage, when it appeared that no peerage by prescription was ever allowed in this country. No one can prescribe to a seat in this House; such right must have proceeded from the Crown, either by writ of summons or letters patent. A party claiming a Barony as of right, must show that his ancestor was summoned, and sat in Parliament, or must produce the patent of creation, which this House would not, at least never did, presume to have existed and been lost. No man can be a Peer without matter of record, for peerage is not a matter *in pais*, to be gained by prescription, or usage. (*Per Lord Holt*; *Cruise* on Dignities, 260: and *per Justice Brampton, Collins* on Baronies, 256.) As this Barony of *Slane* cannot be a Barony by prescription, nor a Barony by letters patent, for there was no creation of Barons by patent in England or Ireland at the time that the Barony of *Slane* was created, the dignity must have been created by writ, and their Lordships were not asked to presume a writ, for there are writs produced of the time of Edw. 2, and they are not in any way different from the ordinary writs of summons in England. There is no reason to suppose any diversity in the creation and descent of Peerages in England and Ireland; for the same thing happened in several cases in the English Peerage that has occurred so often in the *Slane* Peerage, namely, that the heir male was summoned and sat in Parliament to the exclusion of the heir general, probably because the heir male had succeeded to the entailed family estates, and was called up to the House of Peers as the head of the family; or

through misconception that the Barony vested in the heir male, like the mistake that occurred in the Barony of *Strange* in England.

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The successions in the old Irish Baronies enumerated by Mr. Lynch, went on without judicial determination on any of them. When the *La Poer* Barony, also an ancient Barony, came to be investigated, it was adjudged to be a Barony in fee. That case was solemnly decided by the House of Lords in Ireland (*h*), and was an authority to show that the common law regarding the descent of Peerages was precisely the same in Ireland as in England. It is found that the most ancient of the Baronies enumerated by Mr. Lynch as being descendible to heirs male, and continuing always in the same name and family, were Baronies in fee, and passed through several different families; for instance, the Barony of *Offaley*, while it was a Barony in fee, passed through five families until it vested in the Fitzgeralds, in whom after a forfeiture there was a new creation of the Barony to heirs male of the body in the time of Philip and Mary. The *Killeen* Barony, another Barony in fee, passed through several names and families. As to the Barony of *Delvin*, there is no authority for saying that was descendible to heirs male: it was referred twice (1800 and 1814) to the law officers of the Crown in Ireland, and they reported that it was a Barony in fee, and had already been inherited as such by a female, and it was then in abeyance. At the same time they were of opinion, that the case might be submitted to the consideration of the House of Lords. That recommendation was matter of form, and not an expression of doubt on the nature or descent of the Barony.

(*h*) 4 Lords (Irish) Journals for 1767, pp. 418 and 420.

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Lord *Brougham* :—Their opinions show that the general proposition, which Mr. Lynch maintained—I think needlessly—was not universally received by Irish lawyers, who appear, on the contrary, to suppose that there were Baronies in fee. The thing that produces most effect on our minds, is the particular pedigree of the claimant in this case, for if we should say, in the teeth of that pedigree, that the descent of this family in this Peerage is, what you contend, to the heirs general, we should be coming to a conclusion which would be not only against reason, but of the first impression. I never remember a case of any Peerage in which a claim was set up and allowed by this House, which was contrary to the fact of the history of that case. That is the difficulty; and I must say, that unless you can explain it satisfactorily to us, I think you must mend your hand.

Sir *W. Follett* :—The same succession of heirs male happened in the Baronies of *Strange* and *Abergavenny*; not so often indeed, but the rule ought not to depend on the number of instances. The same occurred in the Barony of *Clifford*, created by writ of summons, 28 Edw. 1, and which vested in George *Clifford*, Earl of *Cumberland*, who was heir male and heir general of the first Baron. He died in 1605, leaving a daughter; but in 1628 Henry *Clifford*, son and heir apparent of *Francis*, Earl of *Cumberland*, brother of *George*, Earl of *Cumberland* and Baron *Clifford*, was summoned as Baron *Clifford*, and sat on the precedence of the ancient Barony. But in 1691, the Earl of *Thanet* claimed and obtained the ancient Barony as heir general of the daughter and heiress of the said *George*, Earl of *Cumberland*, and in 1737 *Richard*, Earl of *Burlington*, claimed the

Barony created by the writ of summons to Henry *Clifford* in 1628, as the heir general of that person, on the ground that his father not being seised of any Barony, the writ to the son and his sitting created a new dignity; and this House resolved that the petitioner was entitled. That second Barony of Clifford is now vested in the Duke of *Devonshire*. That case, in all its bearings, is very much in point here. The Barony of *Berkeley* is another instance of a female being passed over, and the heir male being summoned and sitting in the precedence of the ancient Barons. The same happened in the Barony of *Dacre* more than once. That was an old Barony. In 1457, *Thomas* the fifth Lord *Dacre* died, his eldest son having died before him, leaving a daughter married to Sir Richard *Fiennes*, who was summoned to Parliament in her right. Her uncle also and the heirs male were summoned in 38 Hen. 6. So also in the case of the *De-la-Warr* Barony, the heir male of Thomas Lord De-la-Warr, who died 1554, was allowed the precedence of an ancient Baron, although heirs general were then in existence. Several other ancient English Baronies went in a similar manner, and the only way to account for these anomalies is, that the law on the subject was not then settled. The law would undoubtedly be later known in Ireland; and from the period that it might have been known there, it does not appear that this Barony of *Slane* passed from the heirs general. The prerogative of the Crown was not limited formerly, as it is now, to some one of the co-heiresses, but the king might then have called up any person to a Barony that fell into abeyance, and therefore was likely to summon the heir male to the seat and precedence in Parliament of the ancient Baron. That prerogative of the Crown was exercised on seve-

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ral occasions, even after it was restrained by the statute of Hen. 8, in the Baronies of England before referred to, and in the Baronies of Ireland; and having a regard to that fact, we find no difficulty in reconciling all those anomalies of the succession of heirs male to the exclusion of heirs general. It was sufficient for Mr. Bryan, the claimant in this case, to show that he is the lineal descendant of William Lord *Slane*, who was summoned and sat in Parliament in the reign of Charles 1, and of Christopher and the other Lords *Slane* who succeeded. The Countess of *Tyrone*, in claiming the La Poer Barony in Ireland, showed that her father and grandfather were summoned and sat, and the House of Lords in Ireland held that to be sufficient, and resolved that she had made out her claim.

This case becomes, from the nature of the arguments urged against the claimant, of the greatest importance to the English as well as the Irish Peerage; and if a new principle of decision should be adopted in respect to the latter, their Lordships may be obliged to apply the same in deciding claims to English Baronies, and will thereby shake the titles to the most ancient dignities which have been securely enjoyed for many years.

Lord *Brougham* :—If your Lordships should think that this case requires to be further investigated, we shall adopt the suggestion made by the Attorney-general, to hear the Attorney-general for Ireland on a future day. This being an Irish Peerage, the suggestion is founded on convenience and on more important considerations. I quite agree in the observation made at the bar, that this is an important case, and that your Lordships' decision will be one which—I will not say may shake or affect titles in both kingdoms; “but

if it shall proceed on Mr. Bryan's claim, or on certain views of the case presented by those who represent Mr. Fleming, in favour of his claim;—in either of those cases I quite agree, will have a very important general influence. For if, in the first place, you adopt Mr. Lynch's proposition (his larger proposition), that there is no such thing as a Barony in fee in Ireland, and that there is no law there such as was recognised in this country about the end of the seventeenth century, in cases which established the doctrine that summons and sitting make a Barony to the heirs general of the body of the grantee (a Barony in fee tail general)—if your Lordships adopt that general proposition, that there is one law in this respect as to peerages in Ireland, and another law as to peerages in England,—there being such Baronies here beyond all dispute, and it being alleged that there is no such Barony in Ireland,—I think that is a very large and important proposition, and by no means to be acted upon without great consideration and most full argument. And upon the same ground I say on the other hand, if we assent to Sir William Follett's proposition, and not only refuse to assent for the present to Mr. Lynch's contention that there is no such thing as a Barony in fee in Ireland, we actually take the claim of Major Bryan as proved in law as well as in fact, and award, or at least report in favour of awarding him the honours which he claims. We certainly do in that event maintain the opposite of Mr. Lynch's proposition, and admit for the first time, as it appears to me, that there is a Barony in fee in Ireland.

Now, is there no way by which we might ward off both these propositions? Is there no result of the inquiry by which we shall neither lay down the negative proposition that there is no such thing as a Ba-

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rony in fee in Ireland, nor adopt the affirmative that there is such a thing? I apprehend there is one obvious course to take, namely, that we shall say, without deciding one way or the other, that there may be in Ireland such a Barony in fee tail by summons and sitting, but we do not think this *Slane* Peerage is shown to us to be a Barony in fee tail, or that it is a Barony in fee at all. Are we, or not, convinced that it was not a creation by a patent to heirs male? Are we, or not, convinced that there is not in Ireland precisely such a writ of summons as we find issued in 27 Hen. 6, in the case which is referred to in Co. Litt. 9 b., and to which I know of no reference anywhere else? If we adopt either of those two suppositions, observe what follows—we adopt a theory quite consistent with the facts in both cases, and we adopt a theory by no means repugnant to principles of law. We do not give a peerage by prescription; we do not say a man may prescribe for a peerage. I agree he cannot. We do not presume the existence of a patent, but we state this—that there is a fact here which entitles us to say, that the peerage certainly existed either by patent to the heirs male of the body in the usual way, or by writ of summons and sitting; but that summons being worded in an unusual way. But there is one precedent in England, and later ones in Ireland, that the writ of summons was not to the party summoned generally, which would carry it to the heirs general of the body, but that it was to him as to Bromflete, in 27 Hen. 6, and to the heirs male of his body. Therefore I think it is, that we cannot be said to be under the necessity of supposing that this case cannot be decided against the claim of Major Bryan; which is Sir William Follett's proposition, thrown out by way of warning, deterring us from deciding against

his claim, that we cannot decide against his client without taking a course which establishes a general proposition of law, which may tend to shake the titles of many peers sitting in the precedence of ancient Barons. That is one view in which I look at the argument used by way of admonition or warning ; and I say, though not for that reason, that I am not by any means prepared to advise that your Lordships ought at present to dispose of this claim, and decide against it. I have a strong leaning—the inclination of my opinion, as at present advised, is strongly against the proposition that this claimant has made out his claim. We are to look at the pedigree. I will not discuss the general proposition, that there may be a Barony in fee or any such thing as a Barony in fee in Ireland, but we must look at the pedigree, the whole effect of which is utterly inconsistent with the present claim of Major Bryan : and I must add, that I have no knowledge of any one instance in the annals of this House in which any claimant was ever held to make out his right where there were so many facts inconsistent with his claim in the course of the descent of the honour which he claimed. That is my great difficulty in the case, and I see more ways than one of reconciling the fact with the possible supposition, and the more remote possibility, of the title having had a legal origin, and having been enjoyed by parties succeeding to each other according to the known rule of descent to such titles.

My Lords, I should wish to have a further opportunity of looking into the cases quoted. Sir William Follett has certainly made a very able argument, and feeling the case to press very strongly against him by the impression made by Mr. Lynch's argument, when last the case was before your Lordships, he has

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exerted himself most ably and laboriously, and has stated a great number of cases and authorities for us to consider. If in the consideration of this case, they appear to me in the course of a few days to be such as to raise a serious doubt on the matter in favour of the claimant, I should then suggest that your Lordships may then call upon the Attorney-general for Ireland to be heard against him: if not, I should not feel disposed to give him the trouble; and if I were called upon to give an opinion now, I certainly could not say that I should advise your Lordships to give him the trouble. I should wish also to have another opportunity of consulting with my noble and learned friend (i), and if the learned counsel on either side are aware of any further account of the writ in the 27 Hen. 6, I should like to be put in possession of it.

Aug. 31.

Lord *Brougham* :—My Lords, this case stood over for the purpose of considering the argument and proofs adduced by one of the claimants, or rather I should say by the counter-claimant, Mr. Fleming, who is let in to contest the claim made by Major Bryan. Mr. Fleming was admitted after the case of Major Bryan had been closed, not to set up his own claim, but to resist the Major's claim, which, if it had been admitted, would have precluded him from ever arguing his case, though, if rejected, Mr. Fleming would still have to prove his own case; consequently, he only appeared, as it were, on the same side with the Counsel for the Crown to contest the claim now before us. We expected to have heard an argument from the learned Attorney-general of Ireland, but I appre-

(i) Lord Lyndhurst.

hend by his not being here during the last two days of our sitting in this case, that he is satisfied with the argument of Mr. Lynch for Mr. Fleming, and does not mean to urge anything further against the claimant's case.

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A very able certainly, and a very elaborate argument was addressed to your Lordships by Mr. Lynch and Sir William Follett, at which my noble and learned friend (k) was present, without whose assistance I should not have proceeded to-day, but that I know he takes entirely the same view of the subject that I do. A great portion however of that argument appears to me to have been unnecessary for supporting Mr. Lynch's proposition. For when he maintains that there is no such thing as a Barony in fee (or fee tail) in Ireland—no such thing as a Barony conferred by writ of summons to Parliament, and sitting there under the writ,—this may be either true or not as a general proposition, and yet I do not see any necessity for grappling with it, or for disposing of it in order to arrive at a sound conclusion on the present case. The comparison of eleven or twelve old Baronies in Ireland with as many old Baronies in England, does certainly seem to show, that whereas these latter have gone from family to family, some through as many as seven different changes, and all subject to at least two or three changes of family; in Ireland, on the contrary, all those ancient Baronies have gone invariably in the same family, a very strong argument no doubt to show the difference of the two classes of Baronies, because it is hardly conceivable that there should have been so many failures of heirs male in England in those families, and no such failures at all

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in any of the families holding the ancient Baronies of Ireland. But it does appear to me and to my noble and learned friend who assisted in hearing the case, that we need not form any opinion upon the general question for our present purpose, and in order to admit Mr. Lynch's right to call upon us to refuse the claim of Major Bryan. We are now upon this particular Barony of Slane, and the circumstances which have attended its descent are such as to leave no doubt whatever in my mind what the law of succession is in respect of this particular Barony. The only question being upon the course of descent in this Barony, if we find it clearly not such as to bring in heirs general in any one instance, but to exclude again and again the nearer female, in favour of the more remote male heir, the question before us is decided, whatever may have been the case with other Baronies in Ireland and England.

My Lords, I never yet saw a case in which parties successfully contended for a claim of right under a particular law of succession, maintaining that there was a certain canon regulating the descent and in their favour, when there was clear proof of the honour in question having descended repeatedly in a different course and by a different rule. It is not merely that there were three or four undeniable exceptions to the canon which the present claimant must establish, but there was not a single instance in the family of his rule being followed. Whoever heard of a person obtaining a Barony by writ or by a lost patent to heirs general, when again and again deaths had happened, and instead of the descent of the honours falling upon the only daughter, or being in abeyance among several daughters, the Barony went away to a remote cousin, being a male, sometimes a nephew,

sometimes a more distant kinsman? Such a fact shuts out the idea that there can be a Barony in fee, or more correctly speaking, in fee tail. One cannot suppose the parties were always slumbering over their rights, more especially after the very remarkable fact which occurs in this case, that the daughter of a deceased peer being in poverty, was allowed 50 *l.* a year pension, and did not take the Barony, though being in that case a peeress in her own right, she would have had considerably more than 50 *l.* a year, as is proved by the fact of the male heir who took the honour, obtaining at the same time 300 *l.* a year. The lady had a strong interest in applying for the peerage, if there had been the least pretence for her claim, as she would have obtained an increase of the provision. It appears to me until the difficulty I am now alluding to is got over, it is impossible for your Lordships to adjudge this peerage to the party claiming in such circumstances.

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Although we have had, in many instances, the most satisfactory evidence of a remoter male having enjoyed the title to the exclusion of a nearer female, unquestionably there has been no sitting in Parliament in some of those cases; but this is accounted for by the circumstance of the family being Catholic, and the peers being successively excluded by the penal laws after the beginning of the 18th century. So that the evidence is the most satisfactory which the nature of the case will allow of; and it is further to be observed, that your Lordships' resolution that Major Bryan has not made out his claim, does not decide the question finally; it does not decide that he is not entitled, and may not hereafter prove his title; it disposes of no general question, that there are or are not Baronies by writ; it only declares that Major

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Bryan in this stage has not proved his claim. A declaration that there are ancient Baronies by writ in Ireland would shut out all pretensions on the part of Mr. Fleming, and it would decide the affirmative in the general question argued by Mr. Lynch, whether or not there is such a thing as an Irish Barony in fee tail.

I have another observation to make with respect to the law of this case. It is generally held that Baronies in fee tail go to the heirs general of the body; and that where a man has a writ of summons and sits according to the exigency of that writ, the dignity descends to the heirs of his body, female as well as male. I know of no instance of any restriction to that generality. I know of no such thing as fee tail special in a dignity—of a dignity by a writ going to the issue of a man by a certain wife, and from the nature of the thing I think it could not be. I know of no instance in England of a Peerage in fee going to the heir male of the body only; but perhaps this is not absolutely incompatible with the nature of the writ. There may possibly be a Barony by summons and sitting, which should go to heirs male of the body, and not to heirs general of the body; I do not think it is wholly inconsistent with the nature of the thing. Supposing the summons were specially framed to *A. B.* to sit and serve in Parliament, I do not see why it might not add, “and the heirs male of his body;” at least it strikes me that though this writ is personal, calling upon the party to come individually and sit, and that by the operation of the Peerage law, such writ followed by sitting carries the honour to the heir of his body; still, if it should express it to be to *A. B.* and the heirs male of his body, on the supposition that *A. B.* might have died before he came and sat, according to the exigency of the writ, I see nothing incon-

sistent in the heir male of the body sitting. I do not see anything inconsistent in such a description carrying a barony in fee to the heir male, such heir male being designated rather by words of limitation than of purchase. I throw out this, however, as a possible supposition only; I think that there is nothing self-repugnant, nor contrary to the principles of law in it; and such a supposition would reconcile the facts of this case with the course of the law, but at the same time we must admit that such a writ to the heir male of *A. B.*'s body might also be said to give a Peerage in fee-tail general to the person answering this description, who should first sit under it. There is no case, nor any authority on this point.

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My Lords, it is important that we should endeavour by all means to reconcile the apparent discrepancy between the English and the Irish law of Peerage. I am very unwilling to admit the idea of there being one law for England and another for Ireland in this respect; and I listened with great attention to the argument of the late Attorney-general, the present Lord Chief Baron, to prove that the law, as to honours, was the same in England as in Ireland. I know there are instances of Peerages in which the law of their descent differs from the law of real estates; nevertheless a title of honour is a tenement, and where the feudal law prevails all dignities are in their origin real property, being held as incident to land, and by the like tenure, and being as much real estates as the land itself; I should therefore be very loth to adopt the proposition that there is one rule not only as to incidents, but as to the original constitution and construction of an estate in an honour, and another as to the original constitution and construction of an estate of another kind. So should I feel as loth to hold

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that one rule prevailed in England and another in Ireland on this matter. There is, however, a supposition involving no doubtful point, and which will equally reconcile the facts with the course of the law, and which assumes that law to be the same in both countries. There may be a lost patent limiting the dignity to heirs male. This is inconsistent with nothing except a statement of Lord Coke, that there was no Barony by patent earlier than the 11 Rich. 2; but it is very possible Lord Coke may be mistaken in this, which is only a point of legal or rather historical antiquity. Between the two difficulties of supposing a different law in the two countries, and supposing a creation by patent earlier than the period assigned by Lord Coke, I have no hesitation in choosing the later as the safer course, and to move your Lordships to determine and report that Major Bryan has not made out his claim.

The Chairman of the Committee reported accordingly, and the House resolved, That the claimant, George Bryan, Esq. had not made out his claim to the Barony of Slane, as claimed by his petition.

A P P E A L

FROM THE COURT OF SESSION.

1837.

July 14. 17.

JOHN MILLER and Others - - - *Appellants.*GEORGE ROWAN and Another - - - *Respondents.*

A. B., by trust deed of settlement, gave all his estate, real and personal, to trustees, with power to keep up the trust by assumption of new trustees; and he directed them to put out on security 2,000 *l.*, and pay the interest to *M. M.* for her life, the said sum itself payable to the trustees on her death; and he directed them to apply the residue of his estate to such benevolent and charitable purposes as they should think proper; and if the same should amount to 600 *l.* or upwards, he recommended to his said trustees and their foresaids, to vest the same in themselves, and apply the proceeds in yearly payments to faithful domestic servants settled in Glasgow. And if the residue should not amount to 600 *l.*, he authorized his said trustees to distribute the same to such charitable and benevolent purposes as they should think proper. The residue was found to amount to 12,000 *l.* HELD, *first*, that the words "the said sum itself payable to the trustees on her (*M. M.*'s) death," did not give the 2,000 *l.* to them beneficially, but it became part of the general estate; and, *secondly*, that the bequest of the residue was not void for uncertainty.

*Requests to
Trustees, and
for Charitable
Purposes.
Costs.*

HELD, *thirdly*, that the costs of all the parties ought to be paid out of the residue, as the instrument was obscurely worded, and the residue was so much larger than the disponent expected.

JAMES BLACK, surgeon, residing in Glasgow, on the 31st of May 1827, executed a trust disposition and settlement, by which he gave his whole

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heritable and moveable, real and personal estate of whatever kind, and wherever situated, to J. Maxwell, G. Rowan, and J. Miller, and to such of them as should accept thereof, and to the survivor and survivors of the acceptors, and to such person or persons as might be assumed by them, or to the survivors or survivor, to supply the deficiency of such as might die or decline to act, and which they were thereby empowered to do when they should see proper, the major number alive and accepting at the time being always a *quorum*, as trustees or trustee for the ends, uses, and purposes after specified: viz. in the first place, to pay just debts, &c.; in the second place, to pay certain sums to persons there named; in the third place, he appointed his said trustees to lend out the sum of 2,000 *l.* sterling on security, taking the interest of the said sum payable to Mary Maxwell, his cousin, half-yearly during her life, and *the said principal sum itself payable to his said trustees, or their foresaids, at her death.* After directing payment of several specific pecuniary legacies to different relatives by name for their own benefits respectively, and to the directors of several public institutions, for behoof of such institutions respectively, the disponent proceeded thus: "And lastly, my said trustees shall apply the rest and residue of my estate and effects to such benevolent and charitable purposes as they think proper; and if the same shall amount to 600 *l.* sterling or upwards, I recommend to my said trustees, and their foresaids, to execute a deed vesting the same in themselves, and apply the annual proceeds thereof, after deducting expenses, in yearly payments to faithful domestic servants settled in Glasgow or the neighbourhood, who can produce testimonials of good character and morals from their masters and mistresses after ten years' ser-

vice; no person to be entitled to more than 10 *l.* sterling yearly, but as much less as my said trustees shall think proper; and if the free residue of my estate shall not amount to the sum of 600 *l.* sterling, I authorize my said trustees to distribute the same to such charitable or benevolent purposes as they may think proper. And I hereby appoint my said trustees, and their foresaids, to be my only executors," &c.

Mr. Black died in October 1834, and Mr. Rowan and Mr. Miller, who alone survived him, accepted the office of trustees. They found the trust property so left to amount to nearly 20,000 *l.*, leaving, after deducting the sums appointed to specific legacies, a residue of 12,000 *l.* In the administration of the trusts two questions arose, first, as to the said sum of 2,000 *l.*, whether Mr. Black intended that sum, after Mary Maxwell's death, to vest in the trustees beneficially and individually, or to become part of the residue; and secondly, whether the direction as to the residue for charitable purposes was not void for uncertainty. The trustees, for the purpose of obtaining the opinion of the Court of Session on those questions, instituted a process of multiplepoinding against the next of kin and other parties claiming an interest.

The Lord Ordinary (*Jeffrey*) pronounced the following interlocutor:—Finds, first, that the fee of the sum of 2,000 *l.*, directed to be life-rented by Mary Maxwell, belongs to and is vested in the trustees, not as individuals, or for their own personal benefit, but as such trustees only, and must accordingly form a part of the residue of his (Mr. Black's) estate, to be disposed of as such residue is by his trust-deed directed to be disposed of, after the determination of the said life-rent, and the payment of all the special legacies and provisions. Finds, secondly, that the destination

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of the whole of the said residue contained in and expressed by the last provision or declaration of the said trust-deed is not void, either for uncertainty, or as having been made through error or ignorance on the part of the truster; that the trustees are therefore bound to carry it into effect, and to administer and apply the said residue in conformity to the said destination, and that the next of kin of the truster have no title or interest in the matter so long as the trustees shall duly administer as aforesaid, &c (a).

From this second finding of the above interlocutor,

(a) The Lord Ordinary added his reasons for the above interlocutor in a note, from which the subjoined is an extract:— The first point turns wholly on a *questio voluntatis*; and it seems to the Lord Ordinary impossible to suppose that the truster really intended to give 2,000*l.* to any individuals who might happen to be vested with the character of his trustees at the death of Mary Maxwell. There is a full power in the deed to assume additional trustees at pleasure, and an instruction to fill up the places of those who might die or be disqualified, while the direction upon which this claim of the existing trustees is exclusively vested, is merely that they shall vest the 2,000*l.* in such a way, as that the interest shall be payable to Mary Maxwell during her life, and the principal to the said trustees and their foresaids (that is, their successors in office) at her death. The Lord Ordinary cannot entertain a doubt that it was to be so payable to them as trustees, and that if not otherwise appropriated by new codicils or legacies of the truster, it must revert and fall back into the general mass of the trust estate.

As to the objection of uncertainty or substantial delegation of the inalienable right of testing to third parties, the Lord Ordinary thinks that it has been set at rest by the recent cases of *Hill v. Burns**, and *Crichton v. Grierson*†, two cases confirmed by judgments of affirmance in the House of Lords. In *Crichton's* case the destination of the residue was quite as vague and indefinite as it would have been in this case, if the sum had fallen short of 600*l.*, but as it greatly exceeds that sum, the Lord Ordinary conceives that the recommendation to apply it for behoof of meritorious servants in Glasgow, is to be regarded as a specific instruction or expression of will on the part of the truster, and in that view it is infinitely more precise than anything that occurred either in *Crichton's* or *Hill's* case, or indeed in any of the earlier cases; and on a point thus settled by authority, it would be idle to go into any general argument on the grounds and reasons of the decisions.

* 2 Wils. & S. 80.

† 3 Wils. & S. 329.

to which generally the Lords of the Second Division adhered, the next of kin of Mr. Black appealed to this House.

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Mr. *Knight* and Mr. *Miller*, for the Appellants:—
In the interpretation of the clause respecting the residue, which was very obscurely worded, regard should be had to the other parts of the deed, and to the whole context. A bequest “for such charitable and benevolent purposes as the trustees should think proper” was too indefinite and uncertain to be imperative on them. All the other bequests for the various existing charitable institutions mentioned in the deed were bequests of specific sums to be specifically applied. They were not left to the discretion of the trustees; whereas the words of bequest of the residue amounted only to a mere recommendation, imposing no obligation on the trustees to take it from the next of kin. Words of recommendation were never held in the law of Scotland to raise a trust, and in England the doctrine of implying trusts from words of desire and recommendation, formerly carried to a length hardly consistent with sound policy (*b*), has been greatly restricted in the more recent cases. In *Sale v. Moore* (*c*) the Vice-Chancellor (Sir Anthony Hart) well observed, that “the first case that construed words of recommendation into a command made a will for the testator; the current of decisions has, of late years, been against converting the legatee into a trustee;” and accordingly, in that case that learned Judge held that a gift of a residue to the testator’s wife, he “recommending to her, and not doubting that she would consider

(*b*) Pow. on Dev. by Jarm. n. 357.

(*c*) 1 Sim. 534.

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his near relations," was not subject to any trust, but the wife took the residue absolutely (*d*). And in another recent case, ultimately decided in this House, *Meredith v. Heneage* (*e*), on the authority of which it would seem the decision in *Sale v. Moore* proceeded, their Lordships held that a gift of real and personal estate to the testator's wife, "in full confidence, and with the firmest persuasion that in her future disposition and distribution thereof she would distinguish the heirs of his late father by devising and bequeathing the whole of his said estate to such of them as she might think best deserving of the preference," was an absolute gift to the wife, not subject to any trust for the heirs of the testator.

In *Morice v. The Bishop of Durham* (*f*), a bequest in trust for such objects of benevolence and liberality as the trustee in his discretion should approve, was held not sustainable as a charitable legacy, but was a trust for next of kin. In *Ellis v. Selby*, a very recent case, a direction by a testator to trustees, to apply his funded property "to such charitable or other purposes as they should think fit," was held by the Vice-Chancellor (*g*) to be void for uncertainty, and that decision was affirmed by the Lord Chancellor (*h*); and the fund so given fell into the residue; and to the same effect was another case, still more recent, decided by one of their Lordships at the Rolls: *Williams v. Kershaw* (*i*).

The Scotch cases of *Hill v. Burns*, and *Crichton v. Grierson*, referred to in the Lord Ordinary's judgment, were not strictly applicable to the present case, the bequest in those cases being to established institutions,

(*d*) 1 Sim. p. 540.

(*e*) Id. 542.

(*f*) 9 Ves. 399.

(*g*) 7 Sim. 352.

(*h*) 1 Myl. & C. 286.

(*i*) Vide *infra*, p. 111.

having perfect machinery for managing them, or to such persons and charities as could be easily pointed out. The testator, in this case, did not provide any permanent machinery for the administration of his intended charity. There is no person or body of persons in existence, that could enforce the trustees to apply this fund for their benefit, and, under those general words, the bequest failed for uncertainty. At all events, if this should be held to be a trust which ought to be enforced, only 600 *l.* of the residue could be applied to it, that being the utmost that the disponent appointed for the charity.

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Sir *William Follett* and Mr. *Austin*, for the Respondents, relied on the cases of *Hill v. Burns* and *Crichton v. Grierson*, referred to in the Lord Ordinary's judgment, and on the case of *Murdoch v. The Magistrates of Glasgow* (*k*). The words of bequest did not limit the sum to 600 *l.*, but if the same should amount to 600 *l. or upwards*, the testator recommended the trustees and their *foresaids*, that is, their successors and survivors, to vest the same by deed in themselves, and apply the proceeds in yearly payments, to faithful domestic servants in Glasgow, &c. The residue having exceeded 600 *l.* it was not necessary to consider the words of recommendation of the application of the residue if it should fall under 600 *l.* The trust was completely established, and the trustees were constituted by the very words, proper instruments for its administration. The English cases referred to were not at all inconsistent with the trust in this case, and in two of them, *Meredith v. Heneage* and *Ellis v. Selby*, it ought to have been mentioned that the words "un-

(*k*) 6 Shaw & D. 186.

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fettered and unlimited," accompanied the gift to the testator's widow, in the former, and the words "without being accountable to any person," were added to the direction to the trustees in the latter case.

Lord *Brougham*, after stating that the questions for consideration arose on a trust disposition and settlement, being in the nature of an instrument *mortis causá*, to operate subsequently to the disponent's death, and after reading those parts of the instrument respecting the bequest of the 2,000 *l.* and of the residue as above cited, proceeded as follows:—Upon the first part it has been contended that the sum of 2,000*l.*, the interest of which was given to Mary Maxwell for life, and to the trustees at her death, did not sink into the general residue of the trust, but was given to the trustees beneficially and for trouble. It did not, however, seem possible to maintain that proposition. The clause came within the general words, creating a trust; the words were "but in trust always for the ends, uses, and purposes after mentioned." The sum was given to them by the name of trustees; it was also given to their foresaids, that is, to the new trustees to be assumed by them, and of whom the maker of the deed knew nothing. To hold it to be a gift for trouble would be doing violence to the whole tenor of the instrument, and nothing but express words or plain implication could take it out of the general trust fund. No reliance, indeed, was placed upon this point at the bar, and had there been nothing more in the case, I should not have detained your Lordships with any observations. But two other questions have been made, and on those the argument has mainly turned; first, whether or not there is a trust constituted by the

deed so as to enable the application of the fund to be effected according to the maker's intention, supposing that to be sufficiently certain, and that it is such an intention as can be supported; and secondly, whether or not the intention is sufficiently certain and can be supported.

Upon the first question, there seems no reasonable ground of doubt. It might be enough to look at the part of the deed immediately following the charitable gift, providing that the trustees named shall execute the conveyances to those whom they are empowered to assume into the trust, with the same powers and for the purposes therein written. Now, among these, is that of assuming others to fill up the vacancies by death or declining to act; and though the trustees are only empowered to assume on vacancies, that is quite sufficient for continuing the trust, and would make it their duty to continue it even if they altogether declined themselves. But there is a sufficient power in the Court of Session to provide for continuing the trust in a case of this description, had there been no such clause. It is unnecessary to inquire, what power the Court has or what it is in the habit of exercising in the case of private trusts becoming defective by death or non-acceptance, although the cases of *Busby* (l), of *Christie* (m), and still more precisely that of *Moir* (n), cases so late as 1823, 1826 and 1827, appear to leave no doubt, that in one way or another, the Court will prevent the failure of a testator's or a disponent's intention for want of trustees. And to this proposition, of course those cases are no kind of exception, in which the Court refused to interfere, where the property was given to the heir or

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(l) 2 Shaw & D. 176.

(m) 5 Shaw & D. 293.

(n) 4 Shaw & D. 801.

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other person upon the trustees dying or refusing to act, as *Macdowall v. Macdowall* (o), a case that came precisely within the principle which ought to govern the exercise of the power of supplying a trust, that if a trustee dies or refuses the trust, where it is quite clear that the intention of the testator was that, in such an event, the heir should take the estate discharged from any trust, the Court would not be fulfilling the intention of the maker of the deed, but acting contrary to his intention, if it supplied a trustee; for that is the very event provided for, the gift going over and the trust ceasing. I apprehend (though it is unnecessary to dispose of that question), that this gift cannot be considered as being in the predicament in which it was contended at the bar it was, namely, that though there is a most distinct constitution of a trust, yet no mention being made of heirs, executors and administrators, if one of the trustees refused to act, so that the *quorum* no longer existed, or if they all refused to act, or all died, the Court had no power to give effect to the testator's intention, an argument which would require a much stronger case to support it than any produced at the bar. But it is unnecessary to enter upon that consideration, for in the present case there is no question whatever arising on it. The case of *Macdowall v. Macdowall* clearly shows, without deciding how the Court would act in the case of a private trust, that without any doubt the Court "will interpose," as it is there said, "where no person has any immediate interest in the management," and estates destined to charitable uses are expressly given as an instance. On this point, I have rather referred to the cases, and especially the more recent ones, than even to the highly

(o) Morrison, 7453.

respectable authority of Mr. Erskine in the third Book of his Institutes, because certainly in former times the Court of Session was used to go further in supplying defects in trusts than its later practice appears to warrant.

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Then, my Lords, as to the second question. Is this gift validly given to charitable uses? The maker of the deed first says that the residue shall be applied by the trustees to such benevolent *and* charitable purposes as they may think proper. Suppose we read “and” “or,” the authorities in the Scotch law do not entitle us to hold that this is so uncertain as to be void. In *Hill v. Burns*, decided by this House, the fund was to be distributed among institutions established or to be established in Glasgow or its neighbourhood “for charitable and benevolent purposes,” the same words; this was held sufficiently certain by the Court of Session, and their judgment was affirmed by your Lordships. Indeed the distinction between charitable and benevolent uses was not taken in that case, and there appears nothing in the authorities on this subject which should lead us to suppose that the Scotch law has ever given the technical meaning to the word “charity” or “charitable,” which our English law has given since the statute of Elizabeth. It is true that in *Hill v. Burns*, institutions in or near Glasgow are named, but I am now citing the case on the use of the word “benevolent” only. For that nothing can turn upon the generality of the words in the present case, namely, “charitable purposes,” if the addition of benevolent does not vitiate the gift, appears clear from the latest decision of this House, that in *Crichton v. Grierson*, where it was held, after a careful consideration of all the authorities by the noble and learned Lord who then presided, that a gift to trustees

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to be applied to such charitable purposes as they shall think fit, is good by the law of Scotland. The addition in that case of bequests to friends and relations was much relied on in the argument at the bar, and in the printed cases, but it does not form the ground of the decision. My noble and learned friend, Lord Lyndhurst, expressly held that charitable purposes would be sufficient by the law of England, and that the Scotch law is less strict than ours in this respect, of which indeed there can be no doubt.

I do not however think that the case rests here. There follows, after the general gift, a recommendation of a specific distribution, namely, yearly payments to faithful domestic servants settled in Glasgow and its neighbourhood, who can produce testimonials of good conduct from their masters after ten years' service, and no one to receive more than 10 *l.* a year, how much less being in the discretion of the trustees. There are several gifts in the cases referred to, which have been supported by the Court below as well as by this House, though considerably less precise and definite than this. Nor does the word "recommend" indicate here a mere suggestion or advice. It must be taken as imperative. The disponent first, it is true, gives the trustees a full discretion, but he then proceeds to specify and provide for two events, the one that of the residue exceeding 600 *l.*, and the other that of its falling below 600 *l.* In the former event he specifies, under the form of recommending, the support of old servants; in the latter event he leaves the trustees to distribute to such charitable or benevolent purposes as they may think proper. Supposing therefore that any doubt could have arisen whether "recommend" was imperative or not, had it merely followed the first general words (though I do not at all

think it would in that case have been otherwise than imperative), the addition of the third clause removes all doubt, and shows that the discretion only is vested where the sum falls short of 600 *l.* That there can be no difficulty in superintending the administration of this fund, I take it to be quite clear. The cases referred to before, and also the case of *Cowan's Hospital* (*p*), prove incontestably that persons having an interest in a charity are entitled to put the powers of the Court in motion with respect to its management, and I take it to be equally clear that the next of kin of the founder may pursue the same course.

The decree appealed from must therefore be affirmed; but as whatever doubt may be thought to exist in the case has been occasioned by the terms of the deed, and more especially considering that this is a case of a fund given to a charity by a person who appears not to have been at all sure,—probably who did not suppose that it would turn out to be anything like so considerable as it has done, for he speaks of its exceeding 600 *l.*, or falling short of 600 *l.*, and it turned out to be 12,000 *l.*,—I am of opinion that the whole of all parties' costs, both below and here, should be borne by the estate.

(*p*) 4 Shaw & D. 276.

Williams v. Kershaw.—At the Rolls, July 13, and December 11, 1835.

A direction by a testator to his trustees to apply the residue of his personal estate to and for such benevolent, charitable, and religious purposes as they in their discretion should think most advantageous and beneficial, and for no other use, intent, or purpose, HELD void for uncertainty.

William Buswell, by his will, devised certain freehold estates to trustees to sell, and directed them to carry the

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proceeds of the sale, together with the proceeds of other property in the will mentioned, to the fund of his personal estate, for the purposes of the will. The testator then gave pecuniary legacies to several charitable and religious bodies, including the *Bristol Education Society*, the *Baptist Missionary Society*, &c. He then gave all his personal estate to his trustees to pay his debts and legacies before given, and as to the residue, he gave several sums thereof in legacies to individuals, and for various purposes, and then proceeded thus: "And as to the surplus and ultimate residue of my residuary personal estate, upon trust, that they the said J. Kershaw, E. Leader, and E. Nicholson, and the survivor of them, and the executors or administrators of such survivor, shall and do place out and invest the same in the public funds, or upon real or government securities in *England*, and from time to time transpose, alter and vary such securities as they or he in their or his discretion shall think fit, and do and shall stand possessed thereof, and of the securities whereon the same shall be placed out and invested, and the interest and dividends thereof, in trust, out of the said interest and dividends to pay unto B. S. the weekly sum of nine shillings; and *I direct my said trustees from time to time, to apply the residue of the said dividends, interest and annual produce to and for such benevolent, charitable and religious purposes, as they in their discretion shall think most advantageous and beneficial, and to and for no other use, trust, interest, or purpose whatsoever.*"

In a suit for the administration of the testator's estate, one question was, whether this bequest of the ultimate residue was void for uncertainty, and it was argued by several counsel.

The Master of the Rolls, after taking time to consider that and other questions in the cause, gave his judgment on the point to this effect:—As to the first question, the first matter to be inquired into, is what the testator meant by those expressions. He had before given legacies for education, for the *Baptist Missionary Society*, for the poor generally, for dissenting ministers, and for a village school, which bequests included, in the ordinary acceptance of the terms, objects benevolent,

charitable and religious. It was argued, in order to prove the gift to be good, that the terms must be taken conjointly; if so, every application must be to a religious purpose, which would, no doubt, be benevolent, and, in a legal sense, charitable; but the question is, did the testator so consider it? Did he mean that there should be no application of any part of the residuary fund except to religious purposes? Such does not appear to me to be his intention; he intended to restrain the discretion of the trustees, only within the limits of what was benevolent, or charitable, or religious. If this be the right construction, then the question is, what the decisions have ascertained to be the rule on this subject." The *Master* of the Rolls, after referring with approbation to the doctrine laid down by Lord *Eldon* in *Morice v. The Bishop of Durham* (a), by Sir *William Grant*, in that case, and in *James v. Allen* (b), and *Waldo v. Caley* (c), by Sir *Thomas Plumer* in *Ommany v. Butcher* (d), and by Sir *John Leach* in *Vezev v. Lainson* (e), but more particularly relying on the two first, and on *Ommany v. Butcher*, said, he was of opinion that these gifts could not take effect, and the ultimate residue was undisposed of.

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(a) 10 Ves. 521.
 (b) 3 Meriv. 17.
 (c) 16 Ves. 206.

(d) Turn. & Russ. 260.
 (e) 1 Sim. & Stu. 69.

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June 12, 13.
July 17.

APPEAL

FROM THE COURT OF CHANCERY.

RICHARD EVANS and Others - - - *Appellants.*THOMAS SHAW HELLIER - - - - - *Respondent.**Accumulation.*
Devise.

A testator devised his freehold and copyhold estates, charged with annuities for his sons and daughter, upon trust, to invest and accumulate the surplus produce thereof for the benefit of his grandchildren, until the youngest should attain twenty-one, when the accumulations were to be divided among such of them as should be then living; and he directed that in case any of his sons and daughter should be living after the youngest of his grandchildren should have attained twenty-one, the residue of the said rents and profits should be further accumulated, and such accumulation divided among his grandchildren, who should be living at the death of the survivor of his sons and daughter; and charged, as aforesaid, he directed that after the death of such survivor his said estates should stand charged for twenty years with the payment of two third parts of the clear produce of them, in equal proportions of so much money as would in fifteen years make 30,000*l.*, which sum, with the interest thereof, he directed should be equally divided among all his grandchildren who should live to attain the age of twenty-one, their executors or administrators. The testator died in 1812, leaving ten grandchildren, nine of them children of one of the annuitants. All of them lived to attain twenty-one, the youngest having attained that age in 1830. The last survivor of the testator's sons and daughter died in 1831.

HELD, that the charge of two-thirds of the produce of the estates was a provision for accumulation, within the Act

39 & 40 Geo. 3, c. 98, and therefore void, so far as it extended to any period after the expiration of 21 years from the testator's death.

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THE Rev. *Thomas Shaw Hellier*, clerk, by his will, dated the 4th of July 1812, devised all his freehold and copyhold estates to trustees, upon trust, to pay out of the rents and profits thereof to his son, *James Shaw*, 400 *l* a year during his life; to his son, *Theophilus Shaw*, 100 *l*. a year during his life, and to his daughter *Mary*, the wife of the Rev. *Richard Yates*, 100 *l*. a year during her life, for her separate use: and he declared that no legatee therein mentioned, who should become entitled to any annual payment by virtue of his will, or of the accumulations therein mentioned, should receive or be paid the same or any part thereof by anticipation, and he directed that if any person or persons who should become so entitled to any beneficial interest under his will, should at any time sell, mortgage, or assign their, his, or her estate or interest, or any part thereof, before the same should become due and payable, every such sale, mortgage, or assignment should be null and void. After other directions the testator proceeded as follows:

“ I will and direct that my said trustees, and the survivors of them, his heirs and assigns, shall from time to time lay out and invest the surplus of the said rents and profits, and also the profits of the coal mines and ironstone at Netherton and elsewhere, and the dividends, interest, and produce thereof, in government or on real securities, in their or his own names or name, in order that the same may accumulate for the benefit of my grandchildren now born and at school, or resident at my house called *Woodhouse*, in the parish of *Wombourn*, and who bear the several

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names of *Elizabeth Shaw, Parthenia Shaw, Mary Shaw, Thomas Shaw, Ann Shaw, Sarah Shaw, James Shaw, Samuel Shaw, and Emma Shaw, and Thomas Shaw*, now resident with his mother at *Oxford*, or at any time hereafter to be born, until the youngest grandchild shall attain his or her age of twenty-one years; at which time I will and direct that my said trustees or trustee for the time being do and shall divide and pay to and among all such of the said children, my said grandchildren, as shall then be living, the said accumulations, in equal shares and proportions; and in case any or either of my said sons and daughter shall happen to die before the time that my youngest grandchild shall attain his or her age of twenty-one years, leaving any child or children, then I will and direct that a like annual sum as the parent of such child would be entitled to receive, had he or she been living, shall be applied and paid by my said trustees or trustee for the time being for and towards the maintenance and education of such respective children or child, in equal shares and proportions; and if but one such child, then the whole of each parent's annual sum to and for the use of such child; and if either of them my said sons or daughter happen to die without leaving any children or child him or her surviving, then the annual sum hereby directed to be paid to him or her shall become and be a part of the said accumulations: and I will and direct that such said annual sum shall be paid to the respective children or child of such of them my said sons or daughter as may happen to die in the lifetime of the survivors of them my said sons and daughter, until the decease of my said sons and daughter.

“ And I will and direct that the residue of the said rents and profits of my said estates shall be further

accumulated, in case any of them my said sons or daughter shall happen to be living after the youngest of my grandchildren shall have attained his or her age of twenty-one years; and that such last-mentioned accumulation shall be divided and paid to such and every of my grandchildren which shall be living at the death of the survivor of them my said sons and daughter, in equal shares and proportions; and if but one such grandchild, then the whole of such last-mentioned accumulations shall be paid to such only grandchild, his or her executors, administrators, or assigns."

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(The testator then gave a power to the trustees to grant leases, and afterwards proceeded in the following words, which give rise to the present appeal:)

"And I do hereby (subject and chargeable as aforesaid) will and direct that, from and immediately after the decease of the survivor of them my said sons and daughter, the whole of my said freehold and copyhold estates shall stand and be charged for *twenty years* with the payment of two third parts of the clear produce of my said freehold and copyhold estates, in equal shares and proportions of so much money as will in *fifteen years* make in the whole 30,000*l.*; and which said sum, with the interest and produce thereof, I will and direct shall be equally divided between and among all my grandchildren who shall live to attain the said age of twenty-one years, their executors or administrators, in equal shares and proportions; and if there shall happen to be but one such younger grandchild, then the whole of the said sum shall be paid to such one younger grandchild."

And, charged and chargeable as aforesaid, the testator devised all his freehold and copyhold estates to the Respondent *Thomas*, the eldest son of his (the tes-

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tator's) said son *James*, and the heirs of his body, with remainders over.

The testator by a codicil, dated the 7th of July 1812, directed that the whole of the legacies and accumulations by his will given to the female children of his said sons and daughter, should be for their respective separate use ; and in case of the death of any of his legatees, before becoming entitled to receive his or her legacy, leaving lawful children or a child surviving, then he directed that such deceased legatee's share and all accumulations, benefit and advantage thereof, should be paid to the children or child of such deceased legatee. And he gave all the residue of his personal estate to the trustees and executors, in trust, to apply the same in payment of his debts, and of the accumulations of the fund mentioned in his will.

The testator died on the 10th of July 1812, leaving the two sons and daughter mentioned in his will, his only children ; and also the ten grandchildren therein named, nine of whom were the children of his son *James Shaw* (who afterwards took the additional name of *Hellier*), and the tenth was the child of another son, who was dead when the will was made. No grandchild was born after the date of the will. In *July* 1814, the original bill in this cause was filed by *Elizabeth Shaw*, the eldest grandchild, who had attained her age of twenty-one at the date of the will, and by the other eight children of *James Shaw*, then all infants, by *Theophilus Shaw*, their uncle and next friend, and by the said *Theophilus Shaw* and Mrs. *Yates* and her husband, against the trustees and executors (the father of the infant Plaintiffs being one of them), and against the said *Thomas Shaw*, son of the testator's deceased son. Several bills of revivor and supplement were afterwards filed in consequence

of the deaths and marriages of parties. The ten grandchildren lived to attain their ages of twenty-one, the youngest of them having attained that age on the 31st of August 1830, whereupon the accumulations directed by the first above cited clause of the will became distributable. Upon the death of Mrs. Yates, the last surviving child of the testator, in September 1831, a question arose for the first time, as to the legal operation of the third clause. The *Vice-Chancellor*, by a decree made on further directions, and bearing date the 2d of *June* 1832, declared, among other things, that the gift of 30,000 *l.* in that clause mentioned, was a valid *charge* on the estates and premises comprised in the will, and that the grandchildren of the testator who lived to attain their respective ages of twenty-one years, were entitled to the said sum of 30,000 *l.*, to be raised in twenty years, to be computed from the day of the death of Mrs. Yates, out of the two third parts of the rents and profits of the freehold and copyhold estates, in equal shares and proportions, by annual payments of 1,500 *l.*, to be deducted out of the rents and profits of the said estates.

From that part of his Honor's decree the present Respondent, who is the devisee of the estates, appealed to the *Lord Chancellor*. Lord *Brougham*, who then held the Great Seal, heard the appeal, and it was afterwards reheard by the Lords Commissioners, who, by a decree bearing date the 27th of February 1836, reversed the *Vice-Chancellor's* decree, and declared that the devise contained in the will of the testator, by which he directed that, immediately after the decease of the survivor of his sons and daughter, the whole of his freehold and copyhold estates should stand charged for twenty years with the payment of two third parts of their clear produce, in equal pro-

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portions, of so much money as would in fifteen years make 30,000 *l.*, was null and void, as far as the same extended to any period after the expiration of twenty-one years from the death of the testator; but that the same was good from the period which elapsed between the death of the survivor of the testator's sons and daughter and the expiration of such period of twenty-one years. And it appearing that the period of twenty-one years from the death of the testator expired on the 10th of July 1833, their Lordships declared, that his several grandchildren, who lived to attain their respective ages of twenty-one, were entitled to such proportion of 30,000 *l.* out of the clear produce of the said estates as, supposing that sum to have been raised out of two third parts of such clear produce in fifteen years, would be the proportion to be raised in the period between the 18th of September 1831, the time of the death of *Mary Yates*, and the 10th of July 1833, the time of the expiration of the twenty-one years from the death of the testator, &c. (*a*).

The present appeal is against that decree. The Appellants are the testator's surviving grandchildren (except the Respondent), and the husbands of some of them, and the son of one who is dead.

Mr. *Knight* and Mr. *Wigram* (Mr. *Bethel* was with them), for the Appellants:—

The gift of 30,000 *l.*, in the third clause of the will, was a valid charge upon the testator's freehold and copyhold estates, and not a trust or direction for accumulation within the Act of 39 & 40 Geo. 3. c. 98 (*b*).

(*a*) The case before the Lords Commissioners is reported, 1 Myl. & C. 135, by the name of *Shaw v. Rhodes*.

(*b*) By the first section it is enacted, "That no person or persons shall, after the passing of this Act, by any deed or deeds,

The validity of the first and second clauses, expressed to be for accumulation of rents and profits for the grandchildren, was not questioned. The devise in the third clause was not for accumulation, expressed or implied, but it was substantially a gift in remainder, expectant on the decease of the survivor of the testator's sons and daughter, of two-thirds of the rents and profits of his estates (not exceeding 30,000*l.*) for twenty years, unto such of his grandchildren as should attain the age of twenty-one years, as tenants in common; and such devise or gift was valid in law. The estates charged with and subject to that gift were devised in strict settlement, one of the grand-

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surrender or surrenders, will, codicil, or otherwise soever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits or produce thereof, shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors, or the term of 21 years from the death of any such grantor, settlor, devisor or testator, or during the minority or respective minorities of any person, who shall be living or in *ventre sa mere* at the time of the death of such grantor, devisor or testator, or during the minority or respective minorities only of any person or persons, who under the uses or trusts of the deed, surrender, will or other assurances, directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulations shall be directed, otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property, so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto, if such accumulations had not been directed."

Second Section. "Provided always, and be it enacted, that nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settlor or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor or devisor, or any child or children of any person taking any interest under any such conveyance, settlement or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions shall and may be made and given as if this Act had not passed."

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children being the devisee. The youngest of them attained the age of twenty-one in 1830; the last survivor of testator's children died in 1831, both events happening within twenty-one years from the death of the testator. Both the Courts below agreed, that so far the devise was good, but they differed as to the validity of the charge after the expiration of twenty-one years from the testator's death. The testator's object in throwing that charge over so large a portion of time, and not directing it to be raised out of the estates at once was, that the estates might pay it gradually, leaving sufficient in the meantime for the other purposes of the will.

According to the true construction of the devise, the testator's grandchildren, as and when they respectively attained the age of twenty-one years, took vested interests in their respective shares, and were entitled immediately on the decease of the survivor of the testator's sons and daughter, or so soon after as they attained majority, to receive annually their respective shares of so much of the rents and profits of the estates as were applicable *de anno in annum* to the raising of the 30,000*l.* The words, "with the interest and produce thereof," must be held to refer to the case of an investment of the shares of such, if any, of the grandchildren as might not be of the age of twenty-one years when the gift began to take effect. To make the charge an accumulation within the *Thelluson* Act, there must be a concurrence of two things, viz., a direction for accumulation, and a postponement of the beneficial enjoyment of the estates. The mischief contemplated by the Act could not arise here, for one of the parties to participate in the gift charged on the estates, was the same who was to take the estates subject to the gift. He on attaining his age of twenty-

one, took a vested interest in the charge, and he might then release it or give it to his executors. If accumulation were directed, it would be ineffectual, as there was no postponement of the beneficial enjoyment. It was evident, from the two first clauses, that the testator knew what accumulation meant; he used the word in them, and omitting it in this clause, in which he created a charge on his estates.

The devise in question not containing any direction for accumulation, the Courts ought not to construe the words so as to impute to the testator an intention contrary to law. The way in which Lord Chancellor *Brougham* put the matter was quite unanswerable. His Lordship said (c), "there is in substance a charge made of two-thirds of the net profits for twenty years, to secure the payment of 30,000 *l.* within fifteen years; and—in case it should not be so paid, with payment of interest of so much as should remain unpaid—that the beneficial interest of the legatees would become vested immediately upon the death of the surviving son or daughter, provided the youngest grandchild had then attained twenty-one; and if such grandchild had not attained twenty-one, immediately upon the happening of that event; from which time the produce of two-thirds of the estate would be receivable by the legatees until the sum specified should be raised, and, consequently, that no accumulation beyond the legal period is directed." The will did not contain any directions for the investment of the sums with which the rents and profits of the testator's estates were charged, nor for the application of the dividends of any investment which might happen to be made of any such sums; and such directions ought not to be

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implied, as such an implication would exonerate the devised estates from so much of the 30,000*l.* charged on them as the accumulated dividends of the sums from time to time invested would amount to, and might prejudicially affect the security of the legatees.

If the *Thelluson* Act had not passed there would be no illegality in this accumulation—taking it to be accumulation. The Act, therefore, aided the construction of the will—it prohibited accumulation; but this was not accumulation. The estate was to bear 30,000 *l.*, payable by instalments, each not exceeding 2,000 *l.* a year. Sir *W. Grant*, in *Longdon v. Simson* (*d*) says, “Suppose, instead of a life, with regard to which there might be some uncertainty, the testator had said, the accumulation should continue 24 years, it would be good for 21 years.” A direction to accumulate would not avoid the whole charge. In a case like this, it was the event that decided everything; the main distinction between executory devises and accumulations under a will was, that the event alone decided the legality of the accumulations. It might be argued again, as it was in the Court below, that some of the grandchildren, being married women, were restrained by the will from anticipating their portions. But this accumulation, arising out of rents of freehold and copyhold estates, might be alienated, and therefore anticipated by fine, &c.

But if the devise in question should be held to amount to a trust or direction for accumulation within the meaning of the statute, it was then submitted that this case was within the proviso or exception of the second section. The parent of nine of the grandchildren took an interest under the will in the estates

(*d*) 12 Ves. 297.

to the extent of 400*l.* a year. The charge was, in effect, a provision in the way of portions for younger children. One of the reasons for which Lord Commissioner *Bosanquet* held this provision not to be within the second section was, that two of the grandchildren were illegitimate (*e*). That was not the fact, and it was not so stated in the pleadings.

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Mr. *Pemberton* and Sir *W. W. Follett* (Mr. *Faber* was with them), for the Respondent:—

It was hardly possible for any one reading the clause in question, in connexion with the two preceding clauses for accumulation, to doubt that it was the testator's object to direct by this third clause a further accumulation for the grandchildren, to be divided among them in equal shares and proportions. What was to be so divided? Not the rents and profits of the estates *de anno in annum*, but the accumulated sum of 30,000 *l.* The direction was in clear terms, that the testator's freehold and copyhold estates, immediately after the death of the survivor of his sons and daughter, should stand charged for twenty-one years with the payment of two-thirds of the clear produce. That was unquestionably a trust for the accumulation of rents and profits within the meaning of the *Thelluson* Act, the object of which was "to restrain all trusts and directions in deeds or wills, whereby the profits or produce of real and personal estate shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein limited." It was not material whether the word "accumulation" was used or not, when it was evident that accumulation was what was meant: nor was it necessary to show a concurrence of a direction for accumulation and

(*e*) 1 Myl. & C. 159.

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a postponement of the beneficial enjoyment; it was quite sufficient if the enjoyment of the annual income was postponed for the purpose of accumulation; if a gross sum was to be raised by adding one year's rent of the estates to another, with or without interest, that was accumulation within the Act. To say that the grandchildren's shares might be alienated or otherwise disposed of, as soon as vested, did not show that this charge was not meant to be accumulation. If the direction to accumulate was void, there was no gift to the grandchildren, and therefore nothing vested in them, as the gift was of the accumulation, and the fund thus accumulated belonged to the devisee of the estates.

It was certainly stated in argument in the Court below, without contradiction, that two of the grandchildren were illegitimate, but whether that was so or not was quite immaterial to the construction of that clause. To adopt the construction put by the Appellants on the exception in the 2d clause of the Act, would be a fraud on it; for that exception applied to the postponement of the estate of the devisee, for the purpose of giving benefits to the devisee's children, which was not this case. The meaning of the exception was, that if the parents of the children took an interest in the estates out of which the accumulations arose, then such accumulations would be protected. But such interest of the parents was not to consist of a mere legacy of small amount; the words were, "any interest under any such conveyance, settlement, or devise." The Legislature could not have meant, that if the parent took a legacy of a horse or 1 l. under the will, that was such an interest in the estates as would bring the charge within the exception of the Act.—[Lord *Lyndhurst*: I think the meaning of "any

interest" is any interest, however minute.]—The Act would be nugatory if an interest of such small amount could bring accumulations within the exception.—[Lord *Brougham*: Yes, and nugatory also, if words in a will, giving even 5 *l.* to the parent during the period of accumulation would have no effect.]—The scope of the exception was, to protect portions for younger children out of an estate devised to their parents. But this charge was not by way of raising portions, it was giving the whole estate to the children for twenty-one years after the death of their parents. The only cases in which a construction was put on the statute were *Griffiths v. Vere* (*f*), and *Longdon v. Simon* (*g*). If the Act had never passed, there could be no question that this charge was for accumulation, but whether lawful or not might be a question at common law. It was contended that this was a mere rent-charge for twenty years, payable *de anno in annum*. If the testator had meant to create a rent-charge of that sort, nothing would be simpler than to state his intention in one line. It was asked, for whose benefit the clause was held to be void? It was for the benefit of the person entitled to the estate, which is charged with the raising of the accumulation.

Mr. *Knight* replied.

The *Lord Chancellor*, observing that the case appeared to present some difficulty on the construction of the will and Act of Parliament, moved that the consideration of the case be adjourned, which was agreed to.

(*f*) 9 Ves. 127.

(*g*) 12 Ves. 295.

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The *Lord Chancellor* :—This was a question on the construction of a will, which directed accumulations for a period of twenty years after the death of the survivor of the testator's children. The question was, whether this direction was not void as against the statute 39 & 40 Geo. 3. c. 98. There had been a decision of the *Vice-Chancellor*, who did not think that the direction was void. The case then came before the Lords Commissioners, when the Great Seal was in commission. It was then fully argued and judgment given, and the reasons for that judgment are fully stated in the report (*h*). The arguments here do not seem to me to have varied the case, and the reasons which influenced my judgment on the former occasion have not been shaken by what I have since heard; I shall therefore move your Lordships to affirm the judgment of the Court below.

Lord *Brougham* :—When the cause was before me, I proposed to direct a case at law for the opinion of the common law judges. There were difficulties in the way of doing that, and so I did not frame the case. When I heard the case I manifested the inclination of my mind, which was at that time in favour of the construction adopted by the *Vice-Chancellor*. I now entertain considerable doubt whether this will does fall within the *Thelluson* Act, but not enough to make me differ from my noble and learned friend on the judgment we should now pronounce.

The judgment of the Lords Commissioners was then affirmed.

(*h*) 1 Myl. & C. 135.

A P P E A L

FROM THE COURT OF CHANCERY IN IRELAND.

1837 :
March 20, 21.1838 :
August 15.WILLIAM SHAW - - - - - *Appellant.*BARRY EDWARD LAWLESS - - - - - *Respondent.*

A testator devised certain real estates to trustees for the use of W. S. for life, with remainders over, and he directed the residue of his personal estate to be invested in the purchase of other real estates. He gave a legacy of 100 l. to B. E. L. as a token of esteem. The will then contained this clause: "And it is also my particular desire that my said executors, whilst acting in the management of all or any of my affairs under this my will, as also my friend W. S. when he shall enter into the receipt and perception of my said rents of K. V. and K., shall continue the said B. E. L. in the receipt and management thereof, and likewise shall employ and retain him in the receipt, agency, and management of the rents and issues of such other lands and premises as shall and may be purchased and settled in pursuance of the directions hereinbefore contained, at the usual fees allowed to agents, he having acted for me since I became possessed of said estates fully to my satisfaction." HELD, by the House of Lords, reversing the judgment of the Court below, that these words did not create a trust in favour of B. E. L.

Agent.
Will.
Words impe-
rative or re-
commendatory.
Costs.

Held also, that, as this case might have been discussed on demurrer without any inquiry into the fitness of B. E. L. for the situation of agent, the costs incurred by an inquiry of that sort in the Court below had been needlessly incurred, and should not be paid by B. E. L. to W. S., but that each party should in that respect bear his own costs.

IN the year 1818, William Alexander Shaw, a merchant of Dublin, became the purchaser of the lands of Kentstown, Veldanstown, and Knockirk, in the county

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of Meath, commonly known by the name of the Kentstown estate, and thereupon appointed the Respondent his land agent of such estate.

On the 17th of August 1829, Mr. Shaw made his will, executed and attested so as to pass freehold estate, whereby, after reciting that he was seised in fee of the lands of Kentstown, Veldanstown, and Knockirk, in the county of Meath, and was possessed of a very considerable personal property, he devised the same to trustees, to the use of his friend William Shaw (the Appellant), then aged about 20 years, for the term of his life, without impeachment of waste; and then to the sons of the said William Shaw, in tail, with divers remainders over. Then followed several pecuniary legacies, and amongst others the following: viz. "I also give and bequeath unto my agent and friend, Barry Edward Lawless, of Harcourt-street, in the county of Dublin, Esq., the sum of 100*l.*, as a token of my esteem for him." The will then proceeded as follows:—"I also give and bequeath to the industrious poor of my estate of Kentstown, Veldanstown, and Knockirk, in the county of Meath, the sum of 150*l.*, which sum I hereby direct shall be paid by my said executors to my agent, the said Barry Edward Lawless, to be by him distributed amongst them in such manner, shares, and proportions, and to such objects of charity residing thereon, as well as in the neighbourhood thereof, as he shall deem most advisable and deserving of pecuniary aid. And it is also my particular desire, that my said excutors, whilst acting in the management of all or any of my affairs under this my will, as also my friend William Shaw, when he shall be entitled to enter into the receipt and perception of my said rents of Kentstown, Veldanstown, and Knockirk, shall continue the said Barry

Edward Lawless in the receipt and management thereof, and shall likewise employ and retain him in the receipt, agency, and management of the rents and issues of all such other lands and premises as shall or may be purchased and settled in pursuance of the directions hereinafter contained, at the usual fees allowed to agents, he having acted for me since I became possessed of said estate fully to my satisfaction. I give, devise, and bequeath to my said friend and agent, Barry Edward Lawless, the sum of 150 £. for the purpose next hereafter mentioned; namely, that he may be enabled to purchase and erect a monumental tablet or slab, containing inscribed thereon the names of the members of my family who have been interred in my burial-ground of Kentstown, and the periods of their deaths; and I desire that the said monumental tablet or slab may be erected in the interior of the church in Kentstown." The will authorised the trustees to receive the rents during the Appellant's minority, and directed them to invest the same, "save such part as shall be applied towards his maintenance and education, and such part thereof as shall be requisite to pay and satisfy the annuities by this my will charged on said lands as aforesaid, in government securities, and shall in like manner from time to time invest the dividends and interest of such securities in the purchase of government securities, so as that the whole may accumulate during the minority of the said William Shaw, and if he shall live to attain the age of twenty-one years be vested and payable to him on his attaining that age; but if he shall die without attaining that age, it is my will that such rents, and the accumulations thereof, shall from and after his decease belong to and be a part of my residuary personal estate." The testator bequeathed the

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residue of the personal estate to his trustees, to invest the same in the purchase of lands to be settled to the same uses as the devised estates; he also directed them how to lay out the money till so invested, and declared that the purchases and investments made during the Appellant's minority, were to be made with the consent of a Master in Chancery; and after the Appellant attained twenty-one, the investments were to be made with his consent in writing. And he appointed guardians for the Appellant during minority.

On the 29th of October 1829, the testator died, being seised of the estates already mentioned, and also possessed of personal property, principally in the funds, amounting to about 90,000 *l.*; and his executors having ascertained the residue of his personal estate, proceeded in execution of their trust to invest the same in the purchase of real estates, and purchased certain lands called the Cruisetown estate, situate also in the county of Meath. They also continued the Respondent in the general duties of land-agent over the estate, in the same manner as he had been by the testator in his lifetime, and also employed him as general law agent and confidential solicitor in the business of effecting and completing the purchase of other estates in execution of their trust.

In December 1829, the Appellant attained twenty-one, and in the summer following, upon the completion of the purchase of the Cruisetown estate, the Respondent being about to enter upon the duties of land agent over that estate, he was informed by the Appellant that it was not his intention to employ the Respondent further as his land agent over either estate, and that he had in fact appointed another person to that employment.

The Respondent, considering that he had a right to be continued in the agency, or to a pecuniary compensation, did by a notice in writing, dated the 21st of August 1831, represent to the Appellant in a formal manner, the rights which he claimed under the testator's will; and after stating that he was ready and willing to act as such agent if permitted, called upon the Appellant either to permit him to act as such, or to make him compensation.

The Appellant having declined to comply with this requisition, the Respondent, on the 8th of September 1831, filed his bill in the Court of Chancery in Ireland, setting forth in substance the several matters aforesaid, and praying that the Respondent might be declared entitled, according to the true construction of the will of William Alexander Shaw, deceased, to be continued by the Appellant in the receipt of the rents, &c. of the lands of Kentstown, Veldanstown, Knockirk, and Cruisetown, and of all or any lands, &c., which might be thereafter purchased for the Appellant's use with any part of the residue of the testator's personal property, pursuant to the trust for that purpose created by his will, as land agent thereof, with the usual fees allowed to such agents, and for general relief.

The Appellant put in his answer, admitting that the Respondent had been employed by the testator during his lifetime, and that the amount of fees payable in respect of the agency was properly stated by the bill; but insisted that the clause of the will relied on, merely expressed a wish or desire which was not imperative upon the Appellant; and that, according to the true construction of the will, he was at liberty to employ the Respondent or not, just as he might think proper.

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This cause was heard in 1833, before Lord Plunkett, then Lord Chancellor of Ireland, who, on the 29th of May, decreed that the Respondent's bill should stand dismissed with costs (*a*).

The Respondent presented a petition of rehearing, in December 1834, to the Lords Commissioners of the Great Seal of Ireland, but the cause came on to be reheard on the 30th of January 1835, before Sir Edward Sugden, then Lord Chancellor of Ireland, who, on the 4th of February following, reversed the decree of the 29th of May 1833, and declared the Respondent entitled to continue to act as agent to the Kentstown and Cruisetown estates; and his Lordship decreed that the Appellant should permit the Respondent to act as agent of the estates during the life of the Appellant, and to retain out of the rents thereof the usual fees payable to receivers; and if the parties should differ as to the amount of such receiver's fees, it was referred to the Master to settle the same; and the Respondent was decreed entitled to his costs of the suit, to be paid him by the Appellant, except the costs of the rehearing, as to which it was ordered that each party should abide his own costs (*b*).

The Appellant appealed against the decree thus made on the rehearing by Lord Chancellor Sugden. There had been a discussion, in the Court below, as to the Respondents fitness for the office of agent, but that discussion was not renewed in this House.

Mr. *Pemberton* and Mr. *Kindersley* for the Appellant:—The decree here is founded on the supposition that words of simply a declaratory nature may create

(*a*) See the report of his Lordship's judgment in *Lloyd & Goold's Case*, temp. Sugd. p. 165 *n*.

(*b*) *Lloyd & Goold, Cas. temp. Sugd.* 154.

a trust, so as to make the Respondent the agent for the Appellant, whether the Appellant desires to have him in that office or not. The first effect of such a decision is, that the proprietor of the estate is totally excluded from its management. It is not denied that words of recommendation may amount to the creation of a positive trust if they are sufficiently strong for that purpose. But that proceeds only on the ground that such was the clear intention of the testator. It cannot be said that it is so here. The matter to be done must be certain; the person in whose favour it is to be done must be certain; and the time itself must also be certain. If the person to whom words of recommendation are addressed has an interest in the matter, mere words of recommendation, not of obligation, will not bind him. The Courts always look to the nature of the subject and to the words applied to it. The subject of the will here is a devise of lands to the Appellant for life, and he must have the ordinary means of enjoying it. The law will not give him an estate in fee, and take from him the common incidents of such an estate without the most clear and express declaration of such an intention on the part of the testator. But even the declarations of the testator, however clearly expressed, will in some cases be without force. If the testator had said that the Appellant should not grant leases for life, that declaration would have been void; he might have granted them during his own life, for the declaration would have been inconsistent with the nature of the estate granted to him. How much less is a doubtful expression of the testator to be strictly adhered to when it is in direct contravention of the nature of the estate given to the devisee. Here the matter is treated on the other side, not as one in which the estate is in-

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terested, or in which the devisee has an interest, but as one relating solely to the advantage of the person supposed to be created the permanent receiver of the rents. Yet it is clear that the testator had some consideration for the nature of the estate, for taken in the strongest sense, the words are not pretended to give the appointment, except during the life of the Appellant, so that it is not fixed as a permanent charge on the estate. *Tibbits v. Tibbits* (c) will be relied on by the other side, but that case does not carry the rule further than every body admits that it must go; and Lord Eldon himself there states (d), that “both the object and the person must be certain.” But it does not deny another principle, namely, that the nature of the subject, and the applicability of the words, must also be considered; and the Court must see whether the declaration or recommendation is reasonable, having reference to the subject matter to which they are to be applied. If these rules are applied, the decree of the Court below cannot be supported. The duties and rights of a land agent are acknowledged.—[Lord Brougham : You are arguing as if the recommendation was to employ him as a general agent for the management of the estate, but is it not merely for the receipt of the rents and profits that he is to be employed?]—“The management of the rents” is part of the expression in the devise, and it cannot be understood but by considering “the rents” as meaning “the estate.” The subject matter, therefore, as the putting of the question proves, is not plain, nor is the statement of the compensation. The words “usual fees” would not have a definite meaning in this country. *Wright v. Atkyns* (e) is a case supporting this argu-

(c) 19 Ves. 656.

(d) Id. 664.

(e) 17 Ves. 255.

ment and establishing as a rule, that the Court will put a reasonable construction on words in a will, having regard to the nature of the subject matter, and the general object of the will itself. A reasonable construction put on the words of this will must be such as to prevent the tenant for life from being deprived of the usual rights incident to the possession of such an estate. In this case, the estate is given to him in the largest possible terms, to the extent even of his not being punishable for waste, &c. ; and the testator's confidence in the devisee is further shown by granting to him the power of making leases. The terms of the bequest of 150 *l.* for the benefit of the poor, cannot be relied on as in favour of the Respondent. Then what is the meaning of the words on which the Respondent founds his present claim ? The words are, "shall continue B. E. Lawless in the receipt and management thereof." The limitation amounts to this, that the executors, while acting under the will in the management of the property, should employ the Respondent, but not that he should be employed afterwards. J. & R. Tarbutt are appointed guardians of the person and estate of the Appellant. If the word "thereof" applies only to the rents and profits of the estate, then what can be the meaning of the words relating to the executors, for they have nothing to do with the rents and profits. The Tarbutts do not receive them. There is an explicit declaration, that when the Appellant becomes of age, he shall enter into the possession of the estates free from the trustees. The question in all the cases has been, not whether the testator meant to confer a benefit on a particular person, but whether he had so expressed it that the intended benefit was converted into a trust. Can it be said, that in this case the testator meant to carve

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out of the estate for life, given to the Appellant, something equally beneficial to the Respondent. The test to be applied is not the amount of benefit that may be conferred on the person named in the will. His interest is not the most important thing to be considered. If a father desired that his son should go to a particular school, the Court might compel the trustees to send him there, but the schoolmaster could not file a bill to compel performance of the direction in the will, on the ground that it would be beneficial to his interests. In like manner, this Respondent cannot, because of his supposed interest, maintain this bill against the owner of the estate. The Appellant is the person whose benefit the testator most desired to secure; yet this decree would go to make his benefit less to be considered than that of the person who is to have the estate after him, and who is not burdened with this agency. Such a construction is contrary to all probability. By the directions of this will, other estates are to be bought. If the Appellant chooses to buy them, it may seem hard that the Respondent is to have the advantage of being the manager of them. But if the Appellant does not buy them, it is clear that the Respondent can have no interest in them. There is not in any one of the cases a proposition of this sort laid down, that the manifest intention of the testator to benefit the tenant for life could be disregarded, and the value of his estate for life cut down, in order to promote the benefit of a third person.—[The Lord Chancellor referred to *Hibbert v. Hibbert* (*f*).]—The words there were too clear to admit of a doubt as to the intention of the testator. There the testator directed “that *A* be appointed receiver of his real and per-

sonal estate," and died seised of no real estate, except an estate in the West Indies, having by his will directed a sum of money to be invested in the purchase of lands in England. *A* was appointed manager of the West Indian estate, upon entering into a personal recognizance to account for the produce. That case is consequently distinguishable from the present. But the case of *Heneage v. Andover* (*g*) is in point. There an estate given by the testator to his wife was declared to be unfettered, "in full confidence that," in the devisee's future disposition thereof, "she will distinguish the heirs of my late father by devising and bequeathing the whole of my said estate together and entire to such of my father's heirs as she may think best deserves her preference." These words, so much stronger than those used in the present case, were held to create no trust, and the decision was afterwards affirmed in this House (*h*). In that case, Lords Eldon and Redesdale relied much on the uncertainty as to the persons who were to take advantage of the provision. Now the heirs of a man are not generally considered uncertain in law, so that that case is a strong authority, for it shows the unwillingness of the Courts to fetter a tenant for life, and to impose on him burdens which are not clearly and indisputably cast on him by the testator. That principle was admitted by Lord Chancellor Sugden in the present case. He said (*i*), "Since the late cases, it is difficult to raise a trust upon words of recommendation, where the property is vested, in words, absolutely and beneficially in the devisee." He afterwards added, that "if property is given absolutely and without restriction, you cannot lightly impose upon it a trust upon mere words

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(*g*) 10 Price, 230.

(*h*) 1 Sim. 542.

(*i*) Lloyd & Goold, Cas. temp. Sugd. 163.

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of recommendation and confidence;" and finally he said, that he had arrived at this decision with hesitation, and that he had gone at length into the question, "not from any difficulty I myself feel, but from sincere respect for the opinions of my noble and learned predecessor." The construction put on the words of the will by that predecessor was clearly the right one. The word "continue" relates to past as well as to succeeding time, and amounts to the expression of a wish to let him go on, not to a declaration that he must never be removed. Then again "continue" here refers only to the old estate, and "retain and employ" are applicable to any after purchased estates, and those words do not mean "keep as before," but "engage." The words, therefore, only amount to a recommendation to do something upon the happening of a contingency. The thing to be done is not certain; the estates not being then in existence, the subject matter is not certain; the amount of the emolument—"the usual fees"—cannot be said to be certain; and on all these grounds, therefore, it is clear that this is not a direction which must be obeyed, but a recommendation which may or may not be adopted. The House will not, without being compelled to do so, fix such a burden on the estate of the tenant for life. The judgment of the Court below must be reversed.

Mr. *O'Connell* and Mr. *Knight* for the Respondent:—The decree now appealed from must be supported. The words in the will are not recommendatory or precatory, but mandatory, and give the Respondent a right to the agency. All the three things, the persons, the subject, and the amount, are certain, and when they are so, the rule of construction

is clear. The object of the Appellant is to strike out all the words of devise, and to prevent them having any effect whatever. When the testator made this will he was not performing any duty or obligation; he was expressing his will, and in doing so, he had a right to make, if he pleased, even a capricious disposition of his property. Only one of the legatees is a relation, so that the disposition on the part of the testator was purely voluntary. In such a case he has but to declare his will, and it must be observed. The expression of his desire is sufficient for that purpose: *Harding v. Glyn* (k). There N. H. by his will gave to Elizabeth his wife, all his estates and leases, and his interest in his house in Hatton Garden, and all the goods and furniture therein at the time of his death, and also all his plate, jewels, &c., but desired her, at or before her death, to give such leases, jewels, &c., to such of his own relations as she should think most deserving. She neither gave at, nor before, her death, the jewels nor goods, &c. to his relations. It was held that she took only a beneficial interest during her life, and that so much of the goods, jewels, &c. as remained in specie, must be divided equally among his next of kin at the time of her death. It was said there by the Master of the Rolls, "The words, 'willing and desiring' have been frequently construed to amount to a trust." That case has not been overruled, and it is much stronger than the present. It is admitted, that to constitute a trust, the words must be mandatory, and the subject, the person, and the amount must be certain. It has been argued here, that the subject is uncertain; first, as regards the period during which the agency is to be continued, and next, as regards the amount of the fees. The agency is to exist,

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(k) 1 Atk. 469.

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in the first place, during the management of the trustees. The executors are trustees for certain purposes. The meaning therefore is clear. The testator has desired them to continue, not to appoint, the agent. The word 'desire' is a word of command; it is will maturing into action.—[Lord *Brougham*: Suppose that the appointment is for joint lives, one of which is at 20, the other at 40. This may make a great difference in the length of the appointment. Does not that render the appointment uncertain in an important particular?]—Not so as to affect its validity. The words of the will are very strong. If the construction now contended for is not supported, all the cases must be reviewed. It is true that inconveniences may arise from holding such a devise to be an appointment. A vindictive landlord having an agent whom he does not like thus forced upon him, may prevent the estates from being occupied; but that sort of case has already been the subject of consideration, and was decided on by Lord Eldon in *Friswell v. Moore*, on the 9th of December 1819. It is to be found in the Registrar's book of that year (*l*), and is in these terms: "*Friswell v. Moore*.—Mr. Horne for the plaintiff moved for payment of money into Court, for an injunction and receiver. The bill stated the will of Thomas Matthew Field, as follows: 'I have appointed Mrs. Mary Moore and Mrs. Dodwell, now living at 40, Doughty-street, to be my executors, to receive and dispose of, in manner therein mentioned, all such rents and monies as may now be due, or as may hereafter become due to me; and to give them as little trouble as possible in performance of this friendly office, I have instructed Mrs. Friswell, who is fully acquainted with the subject, to collect all such interest, and to pay all such

(*l*) Reg. Lib. 1819, fol. 148.

demands thereon as may become due, rendering a true account thereof to my executors, and paying them the net produce, to be by them placed in the public funds in the Old Navy Five per Cents. stock with the stock already standing there in my name. The interest of this increasing stock Mrs. Friswell may be enabled to receive, by my executors granting her a power of attorney so to do, and allowing her 2 *d.* in the pound for her trouble in so doing. This process I desire may be continued for seven years after my death, or so long as Mrs. Friswell shall continue to discharge the same to the satisfaction of my executors.' And the said testator directed that all the residue of the estate should be divided between his two nephews and nieces therein mentioned. The executrixes refused to prove the will. Administration with the will annexed was granted to Thomas Matthews Moore, one of the nephews. He sold out and misapplied testator's stock in the public funds under aggravated circumstances. Bill filed by Mrs. Friswell alone against him. Mr. Koe, in opposition to the motion, took objection that Mrs. Friswell had no interest to support the bill. Lord Eldon overruled the objection, and ordered that defendant, Thomas Matthews Moore, do, within a month, pay the produce of the stock sold into Court, the amount to be verified by affidavits; with an injunction to restrain him from receiving any part of the personal estate." The person, the object, and the amount were not so certain in that case as in the present; yet there a trust was held to be created. And so it was in *Harding v. Glyn*, and in *Cary v. Cary* (*m*); in the latter of which Lord Chancellor Redesdale said (*n*), "When a testator, having it in

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(*m*) 2 Sch. & Lef. 173.

(*n*) Id. 189.

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his power to dispose of property; expresses a desire as to the disposition of the property, and the objects to which he refers are certain, the desire so expressed amounts to a command; and if he shows his desire, he, in fact, expresses his intention, provided that the objects to which he refers are so defined that a court can act upon the desire so expressed. If he is sufficiently explicit in that respect, words expressing desire, words simply intimating that he has no doubt that such and such things will be done, will operate as imperative on the person to whom they are directed. The cases are clear on this subject, that where the property and the objects are certain, any words intimating a wish or desire raise a trust. If the objects are not certain, a trust can no more be raised upon words of desire or request than upon words of actual devise. That was the principle acted on in *Foley v. Parry* (o). The words of the testator there were, "it is my particular wish and request" that his wife and an infant's grandfather "will take care of the education and maintenance" of the infant. They were taken in conjunction with the rest of the will, and were held to charge the maintenance of the child upon the interest of the widow, to whom they were addressed; although, as it was stated by the Lord Chancellor, the words themselves were simply precatory. [Lord Brougham: In none of the cases was there a question as to the interests of the person to whom the recommendation was given.]—Yet their interests must have been affected; and in the case just cited, a charge was positively created. Again, in *Tibbits v. Tibbits* (p), the interests of the parties possessing the

(o) 5 Sim. 138, affirmed by the Lord Chancellor, 2 Myl. & Keen, 138.

(p) 19 Ves. 656; 1 Jac. 317.

estate were directly affected. The words there were, "And I do hereby recommend to my said son to continue his cousins in the occupations of their respective farms as heretofore, and so long as they continue to manage the same in a good and husband-like manner, and duly to pay their rents;" and they were held to create a trust for the benefit of the cousins, and the son was decreed to elect whether he would continue them in the occupation or pay them a compensation. In *Hibbert v. Hibbert* (q), the words were only recommendatory, and it was doubtful whether the testator possessed any real estate; he did possess none in England, but he held one in the West Indies, and to that the person named was appointed receiver. —[Lord *Plunket*: In all those cases the Court thought the intention of the testator was clear. My difficulty here was, as to what really was his intention.]—It is submitted, that the words here sufficiently show the intention of the testator. In *Pushman v. Filliter* (r), the testator gave the residue of his personal estate to his wife, "desiring her to provide for my daughter Anne out of the same, as long as she, my said wife, shall live; and at her decease to dispose of what shall be left among my children, in such manner as she shall judge most proper." It was contended that this was no trust for the children after her death. Lord *Alvanley*, Master of the Rolls, said, "The words are clearly sufficient to raise a trust, for we have now got beyond any possibility of doubt as to the rule of the Court, that all words of recommendation or desire by a person having power to command shall operate as a trust. The only question is, whether the person in whose favour the request is made, and the property to which it applies, are certain; if so, all these words used by a

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(q) 3 Mer. 681.

(r) 3 Ves. 7.

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person having a right to command shall create a trust." But as the words "what shall be left" made it doubtful whether anything might be left, it was held that no trust was created for the children. The principle was clearly stated in that case, but the decision proceeded on the ground that the subject matter, on which the will there was to operate, was uncertain. It is not necessary that the person appointed should be acceptable to the person, of whose estate he is to be collector; it is sufficient for that purpose that the person appointing him has the right to command. The services of a person, who may claim to perform certain duties at the coronation of his sovereign, may be very unacceptable to the sovereign at the moment, but no one ever heard that such a person's right was disputed or denied on that account. There was a case of this kind, *Williams v. Corbet* (s), recently, before the Vice-Chancellor, where a man, by a disposition like the present, was declared auditor of a real estate, and yet the decree of the Vice-Chancellor there was to this effect: "That he is entitled to continue auditor of the real estate, and the trustees shall lay before him an account of the real estate, so far as the same is not now audited, and their future accounts shall be audited by the plaintiff: and it is referred to the Master to declare what is the proper remuneration." In another case, which arose out of the will of the Duke of Bridgwater, a person named Bradshaw was, by that will, appointed superintendent of the estates, and power was given him by that will to appoint an agent. The tenant for life being dissatisfied with the manner in which the man appointed by Bradshaw had performed his duty, filed a bill for his removal, but it never occurred to any of

(s) Since reported, 8 Sim. 349.

the persons concerned in that suit that he could be removed for aught but misconduct. The matter was compromised on terms advantageous to the gentleman in respect of his agency. In the case of Lord Dudley's will a similar circumstance occurred. If the tenant for life chooses to put an end to the right thus created, he must do so on the terms of compensation.

The question whether the tenant for life would be liable to make compensation, should he think fit, contrary to all the Irish practice, to occupy the estate himself, is one which does not arise on the pleadings as they now stand. The words here are not only strong in themselves, and coming from a man who has a right to command, must be taken to express command, but they are immediately connected with others of that nature. Thus the sentence following the one on which the Respondent rests his claim is expressed in these terms: "It is also my further desire."—[*Lord Plunket*: How would the matter be if the tenant had sold his interest?—The testator's direction would still be binding on the estate, which would have been bought subject to the provisions of the will.—[*The Lord Chancellor*: Mr. Lawless claims to have a right as to the estates in possession, and as to those to be bought under the will. Had he a right to file a bill to compel purchase of other estates? That consequence may seem absurd, but every consequence of the inference contended for, however absurd, must be looked at in ascertaining the intention of the testator.]—But here, where the desire has a clear meaning, speculation as to the consequences of carrying it into effect is forbidden to the Court.—[*The Lord Chancellor*: If he has a right to a part of the rents of the estates to be purchased, he would have a right to call on the Court to exercise its discretion as

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to such purchase.] But after attaining 21 the Appellant has a veto on the purchase of estates, so that that right, whatever might have been its extent, need not now be the subject of consideration. Besides, though the will gives the Respondent a right to a percentage on actual rents, it may not give him any right to accelerate the purchase of estates to create rents. The performance of a duty and the receipt of fees go together; and as there would be no duty to perform with respect to unpurchased estates, there would be no right to receive fees. The meaning put on the word "desire" in the Court below is totally unsupported by authority. Lord Plunket said (1), "There can be no doubt that when the testator expressed his 'desire' that the plaintiff should be continued agent over the estate after his death, he meant he should be continued on the same footing as he was employed by himself; that is to say, subject to be removed at pleasure, whenever the party should think fit, either to substitute another person in his place, or to act as his own land agent, if he thought proper to do so." The word "desire" is not thus capable of a double construction. If the testator merely meant to leave it to the will and pleasure of those who came after him, he would simply have left a memorandum of his approbation of the Respondent's conduct. The construction put upon the words by Sir Edward Sugden is much more reasonable. He said (2), "If you say that, this is an office to be held at the mere will and pleasure of the devisee, you must argue that it is so by necessary implication. Why imply this? If something is to be implied, why may I not imply that the testator did not intend it to be so? But then it is said, if the tes-

(1) Lloyd & Goold, 165 n.

(2) Lloyd & Goold, 170 n.

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tator, meant this to be a permanent office, why did he not so express himself? but I say, if he meant it to be a removeable office, why did he not express that intention? There could have been no difficulty in saying this, 'I recommend you to employ Mr. Lawless as your agent as long as you think fit'; that would have been a simple recommendation. The authorities appear to me to conclude this case. I cannot distinguish it in principle from *Tibbits v. Tibbits*, where Lord Eldon says, 'It is clear that recommendation in a will, where the object and subject are certain, amounts to a trust.' It is submitted that, for these reasons, the judgment of Lord Chancellor Sugden must be affirmed. Mr. Pemberton, in reply, said it is admitted, on the other side, that, for the purpose of creating a trust as to any particular thing, there must be a certainty in the person, the object, and the amount. Apply that rule to the present case, and the claim of a trust is at an end. Take the question suggested by the House, whether any right exists in the Respondent to have the personality invested in realty. There is none. Nor would the Respondent have a right to claim some of the personality, or of the annual amount collected from it; yet the personality is directed to be employed for the same purposes as the realty. That shows an uncertainty as to the thing itself. Now look as to the certainty of the duty. As manager, the Respondent would have the power of letting or occupying the premises, and might claim or remit the rents—as irremovable manager, he might prevent the owner of the estate from doing any of these things. On the other side this is denied, and it is said that he has merely to receive the rents and profits of the estate. The de-

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decree does not so treat the matter, for it declares him entitled to be continued as agent. Now the rights and duties of an agent are not limited to merely receiving and paying over rents, and an agent is prevented from abusing his power, solely by the power of the principal to remove him. In this case it is clear, that what are the rights and duties of the situation claimed by Mr. Lawless, no one can positively tell. Then again, the very nature of the office of an agent implies a power on the part of the principal to remove him. In the nature of the office, therefore, is to be found, under ordinary circumstances, the limit of its duration. Yet that is contrary to the construction contended for on the other side, for the Respondent is said to be constituted agent for the life of the Appellant. Here again is uncertainty. The amount of remuneration, and even the sources from which it is to be derived, are also uncertain. To affirm this decree will be to give the Respondent a right to prevent the Appellant from residing on his own estate, and managing it. He must henceforth employ an agent, and that agent must be the Respondent. Suppose, instead of a manager of an estate, it was the case of a servant, and suppose the devisee to have no occasion for a servant, would this recommendation amount to a direction to him to keep up the establishment? Would it amount likewise to a prohibition to him against selling the estate? If the testator here had determined on securing an advantage to the Respondent at all events, he might have given the Respondent one-twentieth of the estate at once, instead of giving him a claim to an office which would secure him that amount of benefit. *Williams v. Corbet* does not resemble this case. The appointment of Williams was that of an auditor, who was to control

the accounts of trustees; but here he is to control the acts of the principal. Nor is the case of the Bridge-water Estates in point, for there was a direct declaration of the intention to benefit a particular individual at all events, and the words were of the most express and positive kind. There is no such intention so expressed here. On the contrary, if the Appellant was to die leaving children, the Respondent might at once be turned out of his situation. In all respects, therefore, this portion of the will is too uncertain to create a trust in favour of the Respondent.

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The Lord Chancellor:—As we shall have to decide between the judgments of two judges of the greatest experience and learning, we ought to take time to consider this question.

Judgment postponed.

The Lord Chancellor:—This case comes on appeal here from the Court of Chancery in Ireland. The question for consideration arises upon the construction of the will of Wm. Alexander Shaw, by which he devised certain estates to two trustees to the use of Wm. Shaw, the present Appellant, for life, with remainders over, and the will then contains this provision (x) (his Lordship read it). Then he directs the residue of his personal estate to be invested in the purchase of other lands, to be settled to the same uses as the devised estates. The question which came before the Court of Chancery in Ireland was, whether the Respondent Lawless had a right, as against Shaw.

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(x). See *ante*, 130.

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the tenant for life, to be continued in the receipt of the rents and profits, and to have the benefit of the usual fees payable to agents in Ireland in respect of the management of estates there. There had been two decrees in the Court of Chancery in Ireland of a directly opposite nature. The cause first came before Lord Plunket, who being of opinion that the provision in the will did not give Lawless a title as against Shaw, dismissed with costs the bill which Lawless had filed. He was pleased to declare, that as to so much of the suit as related to evidence of the fitness of Lawless for the situation, each party should pay his own costs; but that as to the rest, the bill should be dismissed with costs. The cause was afterwards reheard before Lord Chancellor Sugden, who was of opinion that the judgment which had been pronounced by his predecessor was not correct, and he therefore reversed it, declaring that Lawless was entitled to act as agent for the estates then held, and likewise for those that might in future be purchased, and the costs of the suit were given to him. These two conflicting decisions naturally brought the case to your Lordships' bar, and it was argued, when my noble and learned friend (Lord Brougham) was present, and I am happy to say, that we entirely concurred in our conclusions as to the conflict between the two decisions. There was a great variety of cases cited, and the grounds on which the title of Lawless was rested were, that the words in the will created a trust in his favour; that the testator, who had an undoubted right to dispose of the estate as he thought proper, had given an interest in it to Lawless, whom he described as his friend, and of whose conduct he spoke in terms of strong approbation. The question for your Lordships to consider is, whether these words

amount to a trust, or only to an expression of opinion and advice.

All the cases upon a subject like this must proceed on a consideration of what was the intention of the testator. Now the first observation that strikes one with reference to that matter is, that during the life of the testator Lawless was his agent. But then he was agent only during the testator's pleasure, and, by the terms of the will, the testator desired that he should continue in the agency. Is that desire to be considered a command? if so, for what length of time is he to continue? If he is to continue to act as agent, the natural presumption is, that he is to continue on the same terms as during the life of the testator. If so, that is during the pleasure of the holder of the estate. But then that negatives the presumption of an estate or interest created by the words of the provision, and vested in this Respondent. The Appellant is the tenant for life; he has the legal estate. If Lawless' title is what it has been argued to be, he has an equitable charge on the legal estate of Shaw; and as he is to have the usual fees of 5 per cent. the result would be, that Lawless would not only be an equitable incumbrancer to that amount, but would have a right to manage and direct the estate, and would have full power over the conduct of the property. If so, the testator must have intended that Shaw, to whom he gave the estate for life, should not have the direction of his own estate, for the two powers of direction and management are inconsistent with each other. He must be taken, on this view of the case, to have intended that the legal devisee for life should not have the management, but that the equitable incumbrancer on the real estate should have the control and management of the property. But the trustees of the will are, during a considerable

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part of the time, to have not only the management of the estate which the testator devised, but are authorised and directed to lay out part of the personalty, the residue, in the purchase of other lands. If Lawless is the equitable incumbrancer to the amount of one-twentieth part of the income of the estate, he has a clear interest in the residue, for he might take one-twentieth part of the residue; he might file a bill in Chancery in order to control the application of the residue, and claim to be absolutely invested in what he is entitled to receive, namely, this one-twentieth part. When your Lordships see to what extent, and I might almost say to what absurd extent, this construction of the will necessarily leads, you cannot hesitate in coming to the conclusion that it is at least very doubtful how far this could possibly have been the intention of the testator. There is, it is true, a great variety of cases in which the expression of a wish has been held to create a trust; but the rule of construction in these cases is, that there should be certainty in the object and in the subject of a trust so created; that the expressions in the will should not leave the matter in a doubtful ambiguity. *Cary v. Cary* (y) has been referred to. There Lord Redesdale expressed the rule in these words: "When a testator, having in his power to dispose of property, expresses a desire as to the disposition of the property, and the objects to which he refers are certain, the desire so expressed amounts to a command; and if he shows his desire, he in fact expresses his intention, provided the objects to which he refers are so defined that a Court can act upon the desire so expressed (z)." In *Foley v. Parry* (a) the

(y) 2 Sch. & Lef. 173.

(z) Id. p. 189.

(a) 5 Sim. 138, affirmed on appeal, 2 Myl. & Keen, 138.

Court held that a devise that a devisee in remainder should be educated and maintained from the income of the devised property created a trust in his favour. There everything concurred to show that such was the intention of the testator. In *Hibbert v. Hibbert* (b) a trust was held to be created as to a West Indian estate, and Humphreys, the person in whose favour the devise was made, was appointed consignee. But there the words were clear and express in his favour, though the estate to which they applied appeared doubtful. In *Tibbits v. Tibbits* (c) there was no doubt as to the subject-matter; but still that case carried the doctrine of creation of trusts further than any which had preceded it, though, as it seems to me, not so far as the decree in the present case has carried it. It is true that all that the Court requires is, that the subject and the object shall be defined and certain. Then what is the subject in the present case? It is the right to be employed in the receipt of the rents and the agency and management of the land of another person upon the usual fees. What is the necessary effect of this alleged right? It goes to exclude Shaw from the management of his own estate, or from the receipt of the rents themselves. Then this question arises: Suppose that he parts with the estate, would it, in the hands of a purchaser, be subject to the same liability to this claim of agency on the part of Lawless? Was it the desire or the wish of the testator that it should be so? or did he merely wish that his devisee should employ a man whose conduct had given satisfaction to himself? Some cases of difficulties of another kind were put in the course of the argument. It was asked, among other things,

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(b) 3 Mer. 681.

(c) 19 Ves 656; Jac 317.

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whether, if a testator should say that he desired his son to be educated at a particular school, that would create a trust in favour of the schoolmaster? That would certainly be a matter for the advantage of the schoolmaster, but it could not be contended that he would have a right to enforce the performance of this desire of the testator. It would be an expression of desire made for the benefit not of the master but of the scholar.

The cases arising out of the wills relating to the Bridgewater and the Dudley Estates have been referred to, but they do not apply to the present case.

Having examined all the cases, and quite satisfied myself that there is not a case which comes at all near the present, — I mean, indeed, that all are against the construction contended for by the Respondent, — I am of opinion that the judgment pronounced by Lord Plunket was correct, and I am of opinion that the decree of Lord Chancellor Sugden must so far be reversed.

Then as to costs. Thinking as I do, that the claim of the Respondent was unfounded, I think that the Appellant should be indemnified for defending himself against that claim to the extent of taxed costs; but that he should not have the costs of that part of the case which related to the fitness of Lawless for the situation; for as it was said in the Court below, the case might have been argued on demurrer, and that question need not have been discussed; I think, therefore, that that part of the decree was correct, and I move your Lordships accordingly. I ought to add, that I am instructed by my noble and learned friend to say that he concurs with this judgment.

Order accordingly.

APPEAL

FROM THE EXCHEQUER CHAMBER (IRELAND).

GALWEY *Appellant.*BAKER - - - - - *Respondent.*

A Bill of Exceptions tendered to the direction given by the Judge to the jury, set forth the pleadings and evidence, and then referred to a lease, part of which was inserted by way of extract. The judgment of the Court on the Bill of Exceptions having been brought up by Writ of Error to this House, the counsel for the Plaintiff in Error proposed to read a part of the lease not extracted into the Bill of Exceptions. Held, that they were not at liberty to do so.

*Bill of Exceptions.
Practice.*

THIS was an action of trover brought in the Court of King's Bench, Ireland, to recover the value of certain trees growing on an estate, of which the Plaintiff was the owner in fee, but which was at the time held by the Defendant, under a lease renewable for ever. The Plaintiff claimed the right to the trees under the terms of the lease, and the Defendant claimed to have the property in them by virtue of two Acts of the Irish Parliament (5 Geo. 3. c. 17. and 23 & 24 Geo. 3. c. 39). The cause was tried in March 1835, before Mr. Serjeant Greene, at the assizes for the county of Cork, when that learned Judge directed the jury to find a verdict for the Plaintiff. The Defendant tendered a Bill of Exceptions, which was afterwards decided by the Court of King's Bench in favour of the Defendant, and that decision being affirmed by the Court of Exchequer Chamber in Ireland, a Writ of

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March 13.

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Error was brought in Parliament. The Bill of Exceptions, in stating the evidence for the Plaintiff, set forth some of the proof on his part thus:—"The Plaintiff gave evidence to show that John Galwey and Edward Galwey, esquires, were, at the time of the making of the indentures of lease and release hereinafter mentioned, seised in their demesne as of fee of and in the lands and tenements hereinafter mentioned, and that by certain indentures of lease and release, the said release bearing date the 29th day of October 1789, the said John Galwey and Edward Galwey, demised unto Sir Richard Kellett, knight, all that and those the dwelling-house and demesne lands of Lota, therein described, saving and always reserving out of the said demise unto the said John Galwey and Edward Galwey, and to the person or persons who should from time to time be entitled to the reversion in said lands, all mines, minerals, and royalties happening or being thereon, and also all wood and underwood, timber, and timber trees, standing, growing, or being thereon, or at any time thereafter to stand or grow thereon, with full and free liberty of ingress and regress to take and carry away the same, to hold for a certain term of three lives therein named, with covenant for perpetual renewal at a rent therein mentioned, as by said indenture of release will appear."

In the course of the argument (a) for the Plaintiff in Error, reference was proposed to be made to the lease itself, with a view to show what was the intention of the parties, and for that purpose the learned Counsel for the Plaintiff in Error began to quote some of the provisions of it not set out in the Bill of Exceptions.

(a) The Writ of Error has been argued, but not decided.

Sir *F. Pollock*, for the Defendant in Error, objected to this course. The argument must be confined to that part of the lease which appears on the face of the Bill of Exceptions. This House, as a Court of Error, can not take notice of anything which did not appear there.

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Lord *Brougham*:—Is there anything on the back of the document itself to show that it was used in the argument on the Bill of Exceptions?

Sir *W. Follett*, who, with the *Attorney-general*, appeared for the Plaintiff in Error:—It is marked as admitted by consent.

Lord *Brougham*:—That was at the trial; it is not stated in the Bill of Exceptions.

Sir *F. Pollock*:—The House cannot hear an argument on a state of facts which was not before the Court below.

Sir *W. Follett*:—The lease was put in evidence at the trial under the *prout patet*. The fact that it was so, sufficiently appears by the Bill of Exceptions, and the lease may therefore be referred to. It is impossible to conceive how the Court could decide on this case without seeing the lease. The term of years could only be known from the lease; that term is spoken of in the Bill of Exceptions; the lease is there referred to. It must therefore be taken that the lease appears on the face of the Bill of Exceptions.

Lord *Brougham*:—How can that be? Suppose the Judge, in his report of a trial, was to say that it appeared by such a man's evidence, &c., but that evi-

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dence was not stated on the Bill of Exceptions; according to your argument, you would only have to say that such facts appeared in the man's evidence on the notes of the Judge, and then you might refer at large to that evidence. Yet it is plain, that on that mention of it the man's evidence could not be referred to and read.

Sir *W. Follett* :—There is a distinction between the two cases. The man's evidence might not be read merely because that reference had been made to it; but where a document is referred to, and part of it extracted, the whole of it may be read.

Sir *F. Pollock* :—The rule here, as everywhere else, is, that if a record of an inferior court comes up to a court of error, only so much of anything as is stated on the face of the record can be read.

The *Attorney-general* :—Suppose a Bill of Exceptions said, "As appears by the case," or "as appears by the schedule hereto annexed," the whole case or schedule might be referred to.—[Lord *Brougham* : That is a very different case, and the objection would not arise there.]—But here are words of reference.—[Lord *Brougham* : Words of reference to a lease; but how do we know that this is the lease referred to?]—But there being words of reference here, this indenture must be considered as embodied in the Bill of Exceptions. It is true that no use can be made of documents not set out in the Bill of Exceptions; but that is not the case with this lease, which may be considered as set out, since part of it is extracted, and the lease itself is specifically mentioned.

Lord *Brougham*:—My Lords, I have no doubt upon the question thus incidentally raised for our decision. It would be an important, and I think an injurious novelty, if you were to allow matter which does not appear on the record to be imported into in the course of argument by the counsel. The Statute of Westminster 2. (13 Ed. 1. stat. 1. c. 31.) was this: As nothing which appears on parol can ever make part of the record, and thereby be brought up to a court of error, which is to judge of that record, that statute induced a party by pursuing a particular course, to make certain things, which are not a part of the record, in effect become so and thus form part of the writ of error. But that cannot be the case with matter which is not so dealt with, where parties have not pursued the course which the statute has pointed out. If there was no other objection to the course now proposed this would be sufficient, namely, what security have you, or can you have that that which they refer to is the identical document mentioned in the record. The production of a document indorsed by the officer of the court, at the time of the trial, is not sufficient to satisfy you on that point; the statute requires something else, namely, the seal of the Judge. His signature would not be sufficient. I grant, for the argument's sake, although I do not allow it fully, that the signature gives authority to this as a document read at the trial, but for aught I know to the contrary, there may have been two such documents read at the trial, one with and the other without a certain statement. It would be most dangerous in itself, and certainly contrary to all the ordinary principles of the law, to allow what is now proposed, and I should humbly recommend to your Lordships not to allow it, unless some clear authority is shown for it. There is

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no such authority. This lease does not appear to have been before the court of error, nor even before the Court of King's Bench, when the case was argued there on the Bill of Exceptions. This case has therefore passed through two courts without the whole of this document being considered, and we cannot therefore now, for the first time, admit it to our consideration.

The *Lord Chancellor*:—I am of the same opinion with my noble and learned friend. The course now proposed would get rid of the very object of the statute relating to bills of exceptions. That statute directed a particular course to be pursued, in order that any facts proved at the trial might, if the parties pleased, become part of the record. In this case, certain provisions of a lease have been set out, but the reference to them in the Bill of Exceptions was not for the purpose of vouching for the contents of the lease, but only for such parts as were extracted into the Bill of Exceptions itself. The state of facts, as there exhibited, is that on which the counsel applied to the Judge to give particular directions to the jury. If the rule is as it is, that the Bill of Exceptions should contain all the matters on which the exceptions themselves proceed, then it must be part of the rule, that counsel and the Court of Error cannot refer to parts of documents containing matter not included in the Bill of Exceptions.

The counsel were ordered to confine their arguments to what appeared on the Bill of Exceptions.

A P P E A L

FROM THE COURT OF CHANCERY.

EVAN WILLIAMS MORRIS, otherwise EVAN }
WILLIAMS - - - - - } *Appellant.*

1836 :
April 28.
1837 :
June 19.
Nov. 27. 30.
December 1.
4. 7. }

EDWARD DAVIES and HARRIET his Wife, *Respondents.*

Husband and wife, after living together for ten years, and having one child, agreed to separate. They accordingly afterwards lived apart, but within such distance as afforded them opportunities of sexual intercourse, the husband not being impotent. HELD, that the presumption of law in favour of the legitimacy of a child begotten and born of the wife during the separation, may be rebutted, not only by evidence to show that the husband had not sexual intercourse with her, but also by evidence of their conduct, such as that the wife was living in adultery, that she concealed the birth of the child from the husband, and declared to him that she never had such child ; that the husband disclaimed all knowledge of the child, and acted, up to his death, as if no such child was in existence ; and also, that the wife's paramour aided in concealing the child, reared and educated it as his own, and left it all his property by his will.

*Legitimacy.
Evidence.*

On a motion in the Court of Chancery for a new trial of an issue, the parties by their counsel consented to take the Lord Chancellor's decree, on the evidence taken on the former trials, in order to avoid further expense and delay. HELD, that such decree was subject to appeal to this House.

Practice.

THE question in this case was, whether the Appellant was the legitimate son of *William Morris*, late of *Argoed*, in the county of *Montgomery*, deceased, and

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of *Mary Morris*. In the year 1778 *William Morris*, then of *Shrewsbury*, surgeon, and about 30 years of age, was married to *Mary Gwynne*, who was about 17, with consent of her mother and guardian, her father being dead. By indentures of lease and release made previous to the marriage, certain estates in *Montgomeryshire*, belonging to *William Morris*, and to his uncle *Thomas Morris*, were settled, subject to life estates for them respectively, and to an annuity of 100*l.* for the intended wife for her life in bar of dower if she should survive her said intended husband, and have issue; and also to a term for raising portions for younger children; to the use of the first and other sons of the marriage, in tail general, with divers remainders over, with ultimate remainder to *William Morris* in fee. And by the same indentures and by a recovery, which was suffered in 1781, when Mrs. *Morris* attained the age of 21, certain other estates, her property, situate at *Llanfair*, in the said county, were settled to like uses, subject to certain incumbrances in the indentures mentioned, and to a provision for younger children, and an annuity for Mrs. *Morris* for life if she should survive Mr. *Morris*. They lived together in *Shrewsbury* for ten years, during which they had one child, the Respondent *Harriet Davies*, who was born in 1781. They separated in 1788, and by an indenture then executed by them and a trustee for the wife, reciting, among other things, that in consequence of unhappy differences they had agreed to separate, and that their said daughter should be under their joint control, and educated at their joint expense, Mr. *Morris* secured to his wife, for her own support and maintenance, the rents and profits of certain property therein described, situate at *Llanfair* (formerly her own property), pro-

ducing about 400*l.* a year, for the time they should continue to live separate. Soon after the execution of this indenture Mrs. *Morris* went to reside at *Llanfair*, taking with her some of the servants, among whom was a young man named *William Austin*, and Mr. *Morris* went to reside at *Argoed*, which was between 14 and 15 miles from *Llanfair*.

On the 5th of January 1793 Mrs. *Morris* was delivered of a child (the Appellant), who was taken immediately after his birth to *Wem*, in *Shropshire*, about 30 miles from *Llanfair*, and given to the father and mother of *William Austin*, poor persons, by whom he was brought up for several years in ignorance of the circumstances of his birth. *Ann Evans*, a servant of Mrs. *Morris*, and *Ann Gwynne*, a relation, were the only persons present when he was born. By the same *Ann Evans* and *William Austin* he was taken to *Wem*. He was there baptized as “a base child” by the name of *Evan Williams*, and to that entry in the parish register was added a note that he was supposed to be the child of a son of Edward Austin, a weaver of that place. He was sent to school at *Wem*, and afterwards at *High Ercall*, in *Shropshire*, where he was sometimes called *Evan Austin*, sometimes *Evan Williams*.

In the year 1799 the Respondent *Edward Davies* married the Respondent *Harriet* without the consent of her father, who was thereupon so much displeased with her that he made a will, by which he left all his property to his nephew and other relations. The Appellant was not mentioned in the will, nor ever noticed in any way by Mr. *Morris*. By another will, made by him on the 1st of December 1808, being then reconciled to the Respondents, he devised all the estates over which he had a disposing power to trustees for

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the benefit of the Respondent *Harriet Davies* and her children, without any mention of the Appellant, or of having ever had any son. He died in May 1810.

In the year 1811, the Appellant, then an infant, by *William Hazledine*, his next friend, filed his bill in the Court of Chancery against the Respondents and Mrs. *Morris*, since deceased, and against the personal representative of the survivor of the trustees of the terms comprised in the marriage settlement, which bill, as afterwards amended, stated the said settlement, and the will and death of *William Morris*, leaving the Appellant, his only son and heir-at-law, and that the defendants had obtained possession of the indentures of marriage settlement, and of the title-deeds relating to the settled estates, and had, upon Mr. *Morris's* death, entered into possession of the estates, insisting that *Harriet Davies* was entitled thereto, and that they had obtained some outstanding terms in the same, so that the Appellant could not bring any action at law to obtain possession of them. The bill, after charging that the Appellant was the legitimate and only son of *William* and *Mary Morris*, and as such entitled under the said indentures to the estates thereby settled, prayed that the Defendants, or such of them as should appear to have the said indentures and title-deeds, might deliver up the same to the Appellant, and that an account might be taken of the rents and profits of the settled estates received by the Defendants since the decease of *William Morris*, and that they might be decreed to pay to the Appellant what should appear to be due to him, and to deliver up to him possession of the said estates; and that the testimony of the Appellant's witnesses to his legitimacy might be perpetuated.

The Respondents in their answers, after admitting

the said marriage and settlement, and the death and will of Mr. *Morris*, as set forth in the bill, said that the will contained no mention of the Appellant or of any son or other child but the Respondent *Harriet Davies*, and that in her right, as the only child of Mr. and Mrs. *Morris*, they had, upon Mr. *Morris*'s death, entered into possession of the settled estates; and they further stated, that they were strangers to the Appellant, never having to their knowledge seen him, and that *William* and *Mary Morris* had separated in 1788, and had never afterwards cohabited together; and that therefore, if after such separation, *Mary Morris* had any child, such child was not begotten by *William Morris*, and must therefore be illegitimate.

Mrs. *Morris*, in her answer, said, she had not any son by *William Morris*, and that the only issue she had by him was a daughter, *Harriet*, the wife of *Edward Davies*; that after her birth, and in the month of May 1788, she and Mr. *Morris* separated, and she did not after that time again see him for about seven years. She denied that, to her knowledge or belief, the Appellant was from the time of his birth, or at any time, as in the bill alleged, maintained, educated, or clothed by or at the expense of Mr. *Morris*, who, she believed, knew nothing of him; and she denied that the Appellant had been maintained, educated, or clothed by herself or at her expense, although, about the year 1806 or 1807, she was solicited by *William Austin* to assist the Appellant as an act of charity, and she did afterwards pay a small sum for a year's board for him, and furnished him with some articles of clothing. She believed the Appellant had been maintained, clothed, and educated

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by *William Austin* during his lifetime, and, since his death, by his executors.

In *July* 1812, an order was obtained to examine *Ann Evans, de bene esse*, grounded upon an affidavit that she was upwards of 60 years of age, and the only witness living who could prove the birth of the Appellant, and a commission was issued for that purpose, and in *November* 1812 she was served with a *subpœna* to attend the commissioners at *Shrewsbury* on the 29th of *December* following. *Ann Evans* did not attend, but having absconded and concealed herself for several years, being induced thereto by the Respondents and Mrs. *Morris*, the Appellant was unable to proceed in his suit; and although every exertion was made to discover her retreat, it was not till *October* 1820, and after the Appellant had tracked her through various parts of *England, Scotland, and Wales*, that he succeeded in finding her, and serving her again with an order for her examination. This order also she neglected to obey, and in consequence of her contempt, she was committed to prison in *March* 1821, where she remained until *April* 1822, before she would consent to be examined. After giving her testimony, she was discharged from prison, and died soon afterwards.

Witnesses having been examined on both sides, and the cause coming on to be heard before the Lord Chancellor (a) in *February* 1826, his Lordship, by an order then made on the suggestion of the counsel for the Appellant and Respondents, directed them to proceed to a trial at law at the then next summer assizes for *Shropshire*, upon an issue whether the Appellant

(a) Lord *Eldon*.

was the legitimate child of *William Morris*, late of *Argoed, Montgomeryshire*, Esquire, deceased, by *Mary Morris*, his wife; the Appellant to be plaintiff, and the Respondents defendants; both parties to be at liberty to read at the trial the depositions of any of the witnesses examined in the cause who should be then dead or incapable of attending.

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The issue was tried three times; *first* at the spring assizes for *Shropshire*, in 1827, (having been made a remanet of the preceding summer assizes,) before Mr. Justice *Vaughan* and a special jury, who found a verdict for the Appellant; *secondly* (upon an order made by the Lord Chancellor (*b*) for a new trial on the application of the Respondents), at the summer assizes for the same county, in the same year, before the same Judge and a common jury, who found a verdict for the Respondents, declaring, in answer to questions put to them by the Learned Judge, pursuant to the Lord Chancellor's order, that they did not believe any sexual intercourse took place between Mr. and Mrs. *Morris* at a time when, by the course of nature, Mr. *Morris* could be the father of the child (*c*). The third trial, directed by another order of the Lord Chancellor, dated the 14th of *June* 1828, took place at the summer assizes of that year for the county of *Gloucester*, before Mr. Justice *Gaselee* and a special jury, who, not being able to agree after being locked up together a whole night, were discharged without giving any verdict, the foreman stating to the Learned Judge, that eleven of them were of opinion that access and opportunities of sexual intercourse between the husband and wife were proved; and that there was no satisfactory proof before them that sexual inter-

(*b*) Lord *Lyndhurst*.

(*c*) See 3 Carr. & P. 215.

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course had not taken place, but they could not persuade the twelfth person to agree with them in that opinion (*d*).

Upon application by the Appellant in 1829 for another trial, it was proposed by the Lord Chancellor, and consented to by the counsel for both parties, that, instead of sending the case to a further trial at law, his Lordship should have laid before him, in addition to the depositions taken in the cause, the Judges' notes of the evidence taken at the trials, and should decide the cause upon consideration of the whole of the evidence.

The following is a summary of all that was material to the question of legitimacy(*e*) in the voluminous evidence laid before his Lordship, including the depositions in the cause.

Evidence for the Appellant.

ANN EVANS's depositions were read at each of the trials. She deposed that she was present at, and thereby became acquainted with the time and place of, the birth of a child, who was afterwards known by the name of *Evan Williams*, and whom she believed to be the same person as the plaintiff. He was born at the house of *Mary Morris*, in *Llanfair*, on a *Saturday*, somewhere about *Christmas*, and, as near as deponent could recollect, about nine and twenty years ago(*f*). *Mary Morris* was the mother of the said *Evan Williams*, and was delivered of him by deponent. Miss *Ann Gwynne*, whom deponent believed to be a

(*d*) 3 Carr. & P. 465.

(*e*) Several witnesses had been examined at the trials to show that *Ann Evans* had been kept away by the Respondents and by Mrs. *Morris* from 1812 to 1822.

(*f*) The depositions were made in *April* 1822.

relation of *Mary Morris*, was the only other person present upon that occasion. *Evan Williams* was conveyed, a few hours after his birth, by this deponent and one *William Austin*, then in the service of *Mary Morris*, to within a short distance of a place called *Wem*, about thirty miles from *Llanfair*. Deponent stopped with the child on the road a little way out of *Wem*, and *William Austin* rode on, and brought a woman, whom this deponent afterwards understood to be a Mrs. *Austin*, wife of a weaver of *Wem*, and mother of *William Austin*, and to her *William Austin* delivered the said *Evan Williams* to be taken care of. She believed that the said *Evan Williams* was nursed and brought up under the care of Mrs. *Austin*, at *Wem*, till he went to school at *Ercall*; for about a month or six weeks after his birth deponent went over from *Llanfair* to *Wem*, and saw him there, under the care of Mrs. *Austin*; and upon a subsequent occasion, perhaps three or four years afterwards, deponent went over to *Wem* again, to see her son, who was at school there, and went to the house of Mrs. *Austin*, and there saw a child, whom this deponent considered and believed to be the same as this deponent had conveyed to *Wem*; and this deponent always understood that he continued to be nursed and brought up at *Wem* by Mrs. *Austin*, till he went to school at *Ercall*. She believed that when very young he went to school for a short time at *Wem*, as she heard her son say that *Evan Williams* was at school with him at *Wem*; and she believed he afterwards went to *Ercall*, for deponent's daughter was a servant to *Mary Morris*, and was employed by *Mary Morris* to take messages from her to the said *Evan Williams* at *Ercall*; so her daughter told deponent, and that she had seen the said *Evan Williams* at *Ercall*. The deponent be-

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lieved the said *William Austin* had been dead several years, for she remembered a letter being given to deponent for *Mary Morris* many years ago, purporting to come from an officer in the regiment in which *William Austin* went to serve, and *Mary Morris* read the letter to deponent; and deponent remembered that it contained an account of the death of *William Austin*; she did not know at whose expense *Evan Williams* was boarded, clothed, and educated after his birth, or who was employed to pay for his boarding and education, except that she remembered upon one occasion, when he came from school for the holidays, and was staying with *Mary Morris* at *Shrewsbury*, at the house of a Mr. *Careswell*, where *Mary Morris* was lodging, this deponent bought some trifling articles for him out of her own money; and also, except that, she remembered having heard *Mary Morris* or *William Austin*, or *Ann Gwynne*, mention that *Mary Morris* had sent some cloth over to *Wem* to be made up by a tailor there into clothes for him. A considerable interval elapsed before deponent saw *Evan Williams* again; but about ten or twelve years ago, as near as she could recollect, a young man, called *Evan Williams*, called at her house, at *Llanfair*, on his way to measure some land, as a land-surveyor, as he told deponent, and staid some time conversing with deponent; and she then, and still believed, that that person was the same as the child of whom deponent delivered *Mary Morris*, and to be the same *Evan Williams Morris*, otherwise *Evan Williams*, the plaintiff. The next time, when, to the best of her recollection and belief, she saw the same person, was in *London*, about two years ago; and the next, upon deponent's arrival in *London* about a twelvemonth ago, when he met her at the coach inn, and accompanied

her to prison; and deponent had since occasionally seen him coming to the gates of the prison; and she believed that the person so seen by her upon the said several occasions, and called and known by the name of *Evan Williams*, was the same person as *Mary Morris* was delivered of by this deponent. Deponent further said, that *Mary Morris* lived at *Llanfair* during the ten months previous to the birth of *Evan Williams*; and that during the same ten months *William Morris* usually resided at *Argoed*, a place about fourteen or fifteen miles from *Llanfair*. She did not know whether he ever visited *Mary Morris*, or made her any presents, or had any intercourse with her within the year prior to the birth of *Evan Williams*. She remembered upon two occasions, after *Mary Morris* came to live at *Llanfair*, seeing *William Morris* go into, and, after staying a short time, come out of, the house of *Mary Morris*; and also remembered *Mary Morris* telling deponent that she and Miss *Gwynne* were going over to *Argoed*; and this deponent once saw a cart come with some hams and cheeses to *Mary Morris* from *William Morris*, and *Mary Morris* told deponent that a silver teapot and some other articles of plate, which this deponent saw in her house, at *Llanfair*, had been sent her by *William Morris*; but at what period these occurrences took place, and whether or not within the year prior to the birth of *Evan Williams Morris*, deponent was unable to recollect.

ANNE GWYNNE, in her depositions in the cause, not read at any of the trials, said she was present when *Mary Morris* was delivered of a male child; it was on a *Saturday*, the 5th day of January 1792 or 1793, but she could not tell which. Mrs. *Morris* called her up stairs, and stated that *William Austin* was the

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father of the child, and made her go down on her knees and declare never to tell any person that *William Austin* was the father of the child; she did not wish to deprive her daughter *Harriet* of her birth-right, and wished *William Austin*, who was present at the time, to bring him up to some trade, and mentioned a shoemaker, to which trade *William Austin* objected, and said that he was to clothe and provide for the child. That this deponent, about two months after the birth of the child, accompanied *Ann Evans* to *Wem*, to see the child, and she did see the child at the house of *William Austin's* father and mother.

EVAN EVANS.—I lived with Mrs. *Morris*, at *Llanfair*, about 34 years ago. I went soon after Hallow-tide, and I staid until May. Three horses were kept there; I missed two soon after I was there; in the morning, before *Christmas* a little; they came back, not the day after, but some time in the night of the following day. I did not miss any person from the house; Mrs. *Morris*, two maids, and I, and a kind of gamekeeper, called *William Austin*, lived at *Llanfair*. I was asked by Miss *Gwynne* to lie out the night the horses went away, or else I slept in the house every night. The horses were like as if they had travelled a deal. I rather think Mrs. *Morris* was in the house the night I missed the horses, but she was out of sight, and the first time I saw her again was nine or ten days after. She looked rather less than before she was away. I have seen Mr. *Morris* in the house. I saw him in the parlour with Mrs. *Morris* the first time I saw him; that was at *Christmas*. I saw him through the window, and I asked Miss *Gwynne* who that was with my mistress. It was about the middle of the day when I came home to my dinner. They were standing at the window in the parlour. He went away some time

before night. Nobody but they both in the room. I saw him in *March*. Mrs. *Morris* wanted me to hire myself to Mr. *Morris* at *Argoed*. I saw him then in the kitchen, and in the parlour too when I came to my dinner; when I came back he was in the kitchen. I saw him first in the parlour. Nobody was with them that I could see. He went away before supper. I think he dined, because I saw more meat come to the house than common. I never saw him but twice.

Cross-examined.—He had a white waistcoat and a blue coat. I spoke to him last time in the kitchen. He asked me if I would come to him to live, and I said I was engaged to another place. I never spoke to him but that once; that was three months after the horses were missed. *William Austin* was like the man who had the care of every thing, hunting, fowling, and looking after the garden. He had a horse of his own; one kept for his use. He went backwards and forwards when he had a mind, and nobody dare say anything to him. He used to order us what we were to do. Sometimes he was like a bailiff. He was no master when mistress was in sight; I never saw them walking arm-in-arm. One had a room in one end of the house, and the other at the other end. *William Austin* was there the whole of my time, except that he would go away sometimes for a few days for his pleasure. He kept one dog, a spaniel, and sported sometimes for half a day and sometimes for a day or two. There was the talk of the birth of a child before I went away; before I went away I heard a talk of sending clothes for the child. Before I left the house it was no great secret. I never saw *Evan Williams Morris* until the last assizes. I thought him more like his mother than *William Austin*. I saw no likeness to *William Austin*. In shape he was most like the gentleman in the blue coat and white waistcoat I

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saw in the parlour. *William Austin* raised recruits and went into the army.

SAMUEL JEBB.—I lived many years ago with *Edward Austin*, a weaver, and father of *William Austin*, at *Wem*. Remember hearing a rap at the door a few days after *Christmas* in 1793. I got up to the window, and found a man on horseback. I called my master up, and went to bed again. Next morning, *Sunday*; same morning I heard a child cry; I asked whose it was; he said, we had a present last night. I looked at it, and saw it wrapt in flannel. *Mary Griffith* came to nurse the child frequently, and *Betty Roberts* came to dress and wash it. The child had the best of wearing apparel. How the clothing came I know not, but it was superior to any neighbour's child. I saw the child again two years after, and again two years after that, and I am quite sure the plaintiff is that child. The child was always called by the name of *Evan Williams*.

MARY WORRALL, formerly MARY GRIFFITH.—I knew old *Austin*, of *Wem*. Was employed to nurse a little boy there; it might be three and thirty years since(*g*). It might be half a year old or three quarters; *Jebb* was living in the house at that time; I nursed him a year and a half or two years. I knew a lady of the name of Mrs. *Morris*; she used to come over and sit in the parlour, and take the child in her arms and kiss him, and bid God bless him. After dinner the child threw a decanter down; Mrs. *Morris* said to Mrs. *Austin*, who was displeased, she would have her to know she would not have the child corrected, for it was her own child. I saw the child often afterwards. It went to school ten miles from *Wem*, at *High Ercall*. I have seen the plaintiff, and I am sure he is the same child I nursed.

Cross-examined.—He remained at *Wem* till he went

(*g*) The first trial in 1827.

to *Ercall*, and he was about eight or nine when he went there. The child's name was *Evan Williams*, but he was called *Evan*. They could not be kinder to him if he was their own child at old *Austin's*.

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RICHARD ELLIS, joiner.—I knew Mr. and Mrs. *Morris*. I know plaintiff. Mrs. *Morris* lived in *Meadow Place, Shrewsbury*, fourteen or fifteen years ago; I then knew plaintiff, *Evan Williams*, a boy at that time. He went to school at *Ercall*; I saw him in holiday-time; Mrs. *Morris* behaved very kindly to him, and called him, “my boy,” and he called her, “Mamma.” Mr. *Morris* lived at *Argoed* in 1792; Mrs. *Morris* then lived at *Llanfair*; I saw Mr. *Morris* there two or three times; my father did work for him; I once held his horse whilst he walked towards Mrs. *Morris's* house with my father, who was repairing Mrs. *Morris's* house; this was in the year 1792, early in the spring. I noticed Mrs. *Morris's* person in 1792; she appeared in the family way; in the latter part of the same year, I observed she was very large. It was in the spring of the same year I had seen him. I had seen them together, walking towards the house; she had not then the appearance of being in the family way. About *July* or *August*, I think, that I first saw them together; most certainly I saw Mr. *Morris* in the town of *Llanfair* in the month of *February*; sometimes he came for rent, and sometimes to pay my father for work; I have seen him there at different times in the year 1792.

Cross-examined.—We were repairing two parlour floors and the stairs, and they were repaired the year before also; I am speaking of the year in which repairs were done to the house in which Mrs. *Morris* lived. I have no doubt it was in the year 1792 in which I saw Mr. *Morris* at intervals in *Llanfair*,

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from *February* until the latter end of the year. A small dwelling-house adjoining to the house Mrs. *Morris* lived in, is the house which was under repair when I saw Mr. *Morris*; I do not think the repairs in the two houses went on in the same year, but I do not know exactly when Mrs. *Morris's* was begun. *Robert Lloyd, David Evans, John Lloyd, and Maurice Lloyd* were at work. I was then between fourteen and fifteen. It was only one year that I assisted in a floor and passage. I lived about 150 yards from *Llanfair* at that time.

Re-examined.—I did several jobs at Mrs. *Morris's*; in 1792 I was repairing a small dwelling-house that *Robert Lloyd* was going to live in; I did not observe Mrs. *Morris* was in the family way the last time I saw her and Mr. *Morris* together in *July* or *August*.

JANE ELLIS, mother of *Richard Ellis*.—I remember Mr. *Morris* living at *Argoed*, and Mrs. *Morris* at *Llanfair*; during that time my husband, *John Ellis*, worked for him. I heard a report about a child of Mrs. *Morris's*; it was before then and after then I saw Mr. *Morris* there; that is thirty-four years since. I have seen Mr. and Mrs. *Morris* together, showing some timber for my husband to work; it was about a fortnight before the rumour of the child; it was near *Christmas* that the rumour was.

MARY EVANS(*f*), daughter of *Ann Evans*.—I once lived in service with *Thomas Evans*, my husband's father; I was hurt by a cow's horn in the face, and went home to my mother at *Llanfair*, a little before Lady-day. I recollect my mother and Miss *Gwynne* going to a sale at *Llanfyllen*; Miss *Gwynne* was giving up housekeeping there, and she then came to

(*f*) The jury on the second trial said they had no confidence in the evidence of this witness. 3 Carr. & P. 215.

live with Mrs. *Morris*; I went to Mrs. *Morris*'s because of my mother's absence; she was charwoman there; I recollect Mr. *Morris* coming with a double rap to the door; I opened it; it was after breakfast. Mrs. *Morris* was in the garden; when she heard the double rap she came to the door, and met Mr. *Morris* in the passage; he shook hands with Mrs. *Morris*, and kissed her, and they both burst out crying; after this Mr. *Morris* went into one parlour and Mrs. *Morris* into another; after having done crying a little, she went into the parlour where he was; they were in the parlour two or three hours; they had been together about an hour before they rung for any refreshment, and then they remained some hours; and after that went out of the house together in a direction towards *Garth-Llewyd*; I cannot say whether arm-in-arm, but close together; Mrs. *Morris* said, we are going to *Garth-Llewyd*, to dine at Mrs. *Lloyd*'s. I did not see Mrs. *Morris* again that night; I slept in the house that night; Mrs. *Morris* came back the next evening; but I do not recollect whether she came alone, or whether Mr. *Morris* came with her. When my face was well I went, after a few days, to my service; I was married about two months after that time, certainly in the same year; I came home to my mother's to be married, and lived with her half a year after I was married; my mother's house was not many yards from Mrs. *Morris*'s. I saw Mr. *Morris* several times at *Llanfair*, after I was married; I saw him go into the house of Mrs. *Morris* twice in that year, to the best of my recollection. I was sent by Mrs. *Morris* to Mr. *Morris* at *Argoed*, and saw Mr. *Morris* there; he gave me a letter to bring back, which I gave to Mrs. *Morris*. I lived at *Llanfair* many years afterwards. I recollect seeing Mrs.

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Morris in the winter following that *Lady-day*; she appeared in the family way. I recollect seeing Miss *Gwynne* making gruel or something of that sort, and I saw Mrs. *Morris* in bed at the same time; she had the appearance of a woman having been confined; I saw things which satisfied me that she had been brought to bed; it was the beginning of *Christmas*, to the best of my knowledge. I was married at *Llanfair*; my maiden name was *Meredith* (the name of *Ann Evans's* first husband).

Cross-examined.—I lived at *Liverpool* and at *Oswestry*, where *Ann Payne* was my landlady; I have not conversed with her about this cause, to the best of my knowledge; I never told her the business was settled, and the cause would be tried at *Shrewsbury*; very likely, I may, when *Richard Jones* came from Mr. *Davies* and wanted me to go to the *Fleet* to my mother. I never told *Ann Payne* that if *Austin* got it I was to have 60*l.* per annum for life(i); I never told her that the child was *Austin's*; I never said that *Evans* was *Austin's* child; I know *Richard Payne*; he is *Ann's* husband; I do not remember whether he gave me a caution to speak the truth at the time I was going to my mother at the *Fleet*; I do not recollect saying, "that will not profit me much;" I will not swear that I did or did not say so.

Re-examined.—I know that *R. Jones*, who came to me, was a tenant of Mrs. *Davies*, and whilst *Jones* was there the *Paynes* began to talk to me; *Jones* gave me 5*l.* for me and my little boy to go up to London.

[To fix the time spoken to by this witness, the Vicar of *Llanfair* was called, and he read from the register of marriages for the year 1792: "*Thomas Evans*, of the

(i) *Vide* pp. 206, 207, *infra*.

parish of *Gittsfield*, widower, and *Mary Meredith*, of this parish, spinster, were married in this church by license, the 5th day of *August* 1792." And *ELIZABETH DAVIES*, called for the same purpose, said, "I know Miss *Gwynne*; she lived at *Llanfyllen*; I took a house from her in the year 1792; the day the key was given up was before May; we took it in spring, but did not go into it until *August*; I was married in 1792, the same year I took the house, and we bought a good deal of Miss *Gwynne*'s goods; she went to live with Mrs. *Morris*; my name was *Elisabeth Meredith* before I was married, and my husband's name *Jeremiah Davies*." And to show that this witness was correct as to the time she spoke of, an examined copy of the register of her marriage with *Jeremiah Davies*, the 20th of August 1792, at *Llanfyllen*, was put in and read.]

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MARGARET ROBERTS, at the second trial.—I lived at *Llanfair*, at a place called *Cross Pipes*, only the breadth of the road from Mrs. *Morris*'s, 35 years ago, and saw her very often. I remember seeing Mr. *Morris* under the Town Hall about fall of night. I got up between five and six in the morning to milk, about this time of the year. I went under the Hall. I found a watch there. I took it and put it into my pocket. I met Mr. *Morris*'s servant in the street, and let him have the watch. I saw Mr. *Morris* afterwards on that day at *Llanfair*, coming down towards the house, at the gate of Mrs. *Morris*'s house, about ten o'clock in the morning. I parted with the watch about eight o'clock.

Cross-examined. — After that time I lived twenty years about nine miles from *Llanfair*; always lived at *Llanfair*, or within nine miles of it. Since the action was talked about I mentioned it. I did not mention

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it to any body until this business came out. A person from *Llanfair* came to me and *David Ellis*. He spoke to me at *Llanfair* about it. I was here at *Shrewsbury* at the last assizes. I was not examined as a witness.

ROWLAND MILLS, carpenter.—I lived at *Llanfair* many years ago. There was some talk about a child of *Morris's*. I saw Mr. *Morris* at *Llanfair* nearly three quarters of a year before the talk about the child. Mrs. *Morris* was with him on a foot-road in a meadow beyond the quarry; they walked side by side; I cannot say arm-in-arm. I saw him again in the evening. Again soon after in one of his own fields, with his rod fishing. I saw him again another time, when he came up and asked about some sheep being in the fields. I went with him afterwards fishing, and he employed me to carry the fish to Mrs. *Morris's* house in the evening. He went with me and went into the house. It was in the summer before the talk about the child: the talk of the child was in the winter after, about a quarter or half a year after. He was fishing two or three hours. I carried the fish in my hat.

At the second trial this witness said further—I remember *Margaret Roberts* living at *Cross Pipes*, in 1792. She told me of the watch many years before this trial. I did carpenter's work at *Llanfair*; have seen Mr. *Morris* several times there; have seen Mr. and Mrs. *Morris* once together in the town walking on the foot place. It was in 1792, about the latter end of March. I have seen Mr. *Morris* fishing in the same summer, after May.

Cross-examined.—I know it was that time, because I left to go to *Shrewsbury*. I have seen Mr. *Morris* very often; cannot say how often. I saw him walking with Madam *Morris* about the latter end of March

JOHN ROBERTS.—I lived at *Llanfair*. I remember a talk about a child. I saw Mrs. *Morris* before that; she appeared like my own wife, in a family way. I never saw Mr. and Mrs. *Morris* together until *October*; she then appeared to be in the family way. I saw them in the fields the year before that. Mr. *Morris* was standing in the street, and Mrs. *Morris* talking to him from an up-stairs window in her own house. I saw him in *October* the last time I ever saw him, but I often saw him before. I knew him as well as my own child. I saw them together three times in the whole. *October* was the last time.

At the second trial, this witness further said—I was twenty-seven years of age the *May* following the time I saw them looking out of the window, and I am sixty-two next *May*.

Cross-examined.—I was examined here last spring. I remember the time Mrs. *Morris* had the child; it was no secret in the neighbourhood. That was the only time I had seen them at the house. I had seen them in the fields before. This was in *October*, before the child was born. I should think that Mr. *Morris* must have seen that she was with child. I never saw them but once at the house; that was the last time. I had seen them in the fields years before. I cannot say whether two or three years before. I think I saw them walking in the fields three or four times in the whole, walking side by side. I never saw her walking in the fields with *Morris* when she was in the family way; and I never said so.

WILLIAM HASSALL, Deputy-Governor of Cold-Bath-Fields Prison.—I was born at *Llanfair*. I staid there until *May* 1792, when I went to school at *Shrewsbury*. I knew Mr. *Morris* very well; he lived at *Argoed*. Mrs. *Morris* lived at the *White House*. In 1790 and

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1791 I saw Mr. *Morris* several times at *Llanfair*. I saw him go into Mrs. *Morris*'s house frequently. I am positive I saw him go into the house more than once.

Cross-examined at the second trial.—When he came it was known directly, and buzzed about. I knew also *William Austin*. He came to *Llanfair* with Mrs. *Morris*, and continued to live there: when he (plaintiff) came unaware upon me, I thought him like that *William Austin*. I have seen Mr. *Morris* go into the house many times, but how long he staid I cannot recollect; perhaps about a quarter of an hour. At other times I have seen him go in, but not seen him come out.

ROBERT LEYD, a bricklayer.—When I was eighteen I lived at *Llanfair*, where I made a blacksmith's shop. *Oliver Williams* went into the shop when I finished it in 1792, at *Lady-Day*. The bill produced is in my handwriting for work done at the shop and other work. (Date of bill was 1792.) About a month or five weeks after finishing the shop, Mr. *Morris* rode up to Mrs. *Morris*'s stable, and asked me if Mrs. *Morris* was at home. He got off the horse. I put it into the stable. I rapped at the door, and he went into the house.

Cross-examined.—It was about a month or five weeks after the blacksmith's shop was finished; in the beginning of the spring of 1792.

OLIVER WILLIAMS, a blacksmith.—I rented a blacksmith's shop of Mrs. *Morris*; it was built for me at first. I knew Mr. *Morris*, and saw him at *Llanfair*. I went there before May 1792, and it was in the same year I saw him there, between *July* and *August*. I stopped there from 1792 to 1797. I saw him only once in 1792. I was sent to *Argoed* by Mrs. *Morris* to fetch some things from thence to *Llanfair*. I

brought some horses, some bacon, and three or four stukes of corn.

Cross-examined.—I knew Mrs. Morris's daughter, Mrs. Davies; but I do not think she was at home with her mother at *Llanfair* at the time I have spoken of. I had seen her there a store of times.

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ANNE WILLIAMS, wife of *Oliver Williams*,—I remember the first year I was there seeing Mr. Morris with his wife in Madam Morris's house at the window. I made a courtesy to my landlady and mistress, and she bowed her head to me. The report of the country was that she was with child. I do not see how it could be a bastard.

This witness on the second trial said that it was three or five weeks after she and her husband went to live at the blacksmith's shop that she saw Mr. and Mrs. Morris together, and she saw them together again three years after that; she also said she knew Margaret Roberts at the Cross Pipes at the time, and heard of the watch being found by her.

Mrs. DOLBY.—I lived in *Llanfair* until the last 12 years; I remember Mrs. Morris coming to live at the White House. I have seen Mr. Morris come there, after Mrs. Morris came to live there. I remember seeing a tent in the garden on a Sunday evening as I was coming from church. I saw the tent taking down, and saw Mr. Morris going into the house of Mrs. Morris.

MARY EVANS.—My father and mother lived at *Aithud*, near *Llanfair*. I was between 13 and 14 when I left. I have seen Mr. and Mrs. Morris together arm-in-arm down to my house, and two men with them. Mr. Morris talked of pulling down our cottage. Mrs. Morris would have it down. There were five of us, children, and then he said he would

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not have it pulled down. I went to live with *Ann Lloyd*, a washerwoman, when I left the cottage. When I was at the cottage I saw Mr. and Mrs. *Morris* a score of times; once or twice in the same year.

JOHN EVANS, brother to last Witness.—I know Mrs. *Morris*. Remember her living at the *White House*. Was in the service, off and on, a long time. Knew Mr. *Morris*. Saw him at first at my father's cottage, a little below *Llanfair*; Mr. and Mrs. *Morris*; two couple along with them. Mr. *Morris* came down to the cottage, and threatened to have the cottage down. My father was very ill. Mr. *Morris* gave him money. The other people were gentlemen; one lady besides Mrs. *Morris*. The cottage was not pulled down. I was from fourteen to fifteen or sixteen, or thereabouts. I went to service soon after this at Myver. I saw Mr. *Morris* once while at Myver, which was five miles from *Llanfair*.

WILLIAM HUGHES.—I live at *Pentry*, near two miles from *Llanfair*. I knew Mr. and Mrs. *Morris*; worked for her five or six years. I have seen Mr. *Morris* in *Llanfair* with her in the garden of the *White House*, about thirty-five years since. I was about 15 yards off. I saw him before that time, about two years, but never after that time. They were walking together. I saw the two standing on each side the door of the house; they both went back into the house. I do not know how long he was there. I did not see him come out.

ANN ARTHUR.—I lived with the late *John Morris*, brother to *William Morris*, of *Argoed*. I knew *William Morris* very well; he came to his brother's, my master, very often. I knew Mrs. *Morris*. Once saw her at *John Morris's*. I lived there from *May* 1792, to *May* 1793. Mrs. *Morris* was there, and some other

persons with her, and Mr. *William Morris*; they came to dine and staid dinner.

Cross-examined.—I mean to say I went in 1792, and left in 1793. It was thirty-five years ago; the servant's name was *Sarah*, who lived there when I went to *John Morris*. I never saw her before nor since. No man-servant came with Mr. and Mrs. *Morris*. They came on their feet to *John Morris* at *Penbruton* from *Argoed*, about a quarter of a mile. The grounds join. They stopped until the morning, and then returned to *Argoed*. I mentioned this to *Watson* and *Harper* (the plaintiff's attorneys). Somebody told about it, and they applied to me for what I knew.

EVAN JONES, a shoemaker.—I was apprenticed, in May 1788, eighteen miles from *Llanfair*. I served exactly four years. I then went to work with *Edward Jones*, a shoemaker, at *Llanfair*, about a hundred yards from Mrs. *Morris's*. I became acquainted with the person of Mr. *Morris*: my master pointed him out to me, after being at *Llanfair* about two months. I have seen him afterwards, walking about, and going into the *White House* frequently. It was sometimes called Mrs. *Morris's* house, and sometimes Mr. *Morris's*.

Cross-examined.—Mr. *Morris* lived there when in *Llanfair*; I think he was not always there. I heard he kept a farm at another place. I have seen him there many times walking about, and going into his house, like any common inhabitant.

ELIZABETH WELLINGS.—I knew Mr. and Mrs. *Morris*. Her cook was gone from her, and I went there for nine weeks. It is from thirty-four to thirty-five years ago. Whilst there, Mr. *Morris* came: I went home to sleep between two and three in the morning. There was company there. The company

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were gone, but I left Mr. *Morris* there. I went back about seven in the morning, to get the breakfast, and I found Mr. *Morris* there. He went home about eleven or twelve o'clock next morning. Mr. *Morris's* servant brought a tumbrel, with some wheat, hams, and cheese. I saw Mrs. *Morris* in the family way. The visit of Mr. *Morris* was before then. They appeared friendly together. I have seen them together at other times walking towards the garden, after the visit, and after the hams; and Mrs. *Morris* was in the family way before the hams were sent.

Cross-examined.—I cannot tell the name of the servant, but he said he came from Mr. *Morris*. It was not *Oliver Williams*. The cook was an English-woman; I cannot tell her name. She never came back. *Ann Evans* was there along with me. *Thomas Evans* and *Ann Evans* lived there at the same time. They are both dead. There is not a single living servant that I can recollect. I remember *Evan Evans*, a neighbour. There was no *Evan Evans* living with Mrs. *Morris* at that time. It was about *Allhallows* that I went; it was about a fortnight or three weeks before *Christmas* that I came away. There was an alteration in her appearance when I went away. She was growing bigger. I used to help to make the beds, according as company used to come there. I made a bed for Mr. *Morris* in what we used to call the tea-room. Mrs. *Morris* told me to come and make up a bed, for Mr. *Morris* was coming to sleep there; and Mrs. *Morris* told me that Mr. *Morris* was coming to sleep with her that night. The company staid late: Mr. *Lloyd*, of *Garth-Llewellyn*, Dr. *Price*, and Mrs. *Lloyd*. The company left about eleven o'clock. I was kept there till about two. None of the company slept there but Mr.

Morris. I did the work that was to be done: any-body about the house might see me. I cannot say what time of day Mr. *Morris* came, but he staid to breakfast, and went off from about ten to eleven. *William Austin* was living there. He lived there like a servant. He dined in the parlour, and she called him a servant. He called her mistress. He did not always take his meals in the parlour. I have seen him take his luncheon in the kitchen. He was gone that day somewhere. He came home next day. I do not know at what time, nor where he went to. I was here at *Shrewsbury* last assizes. I was called into the box, but was turned back again.

Mrs. ELIZABETH LLOYD, aged 83 at the first trial. — I live at *Garth-Llewyl*; I have seen Mr. *Morris* at my house; not much acquainted with him. He lived at *Argoed*; Mrs. *Morris* at *Elanfeir*, about a mile and a half from *Garth-Llewyl*. I remember their coming together and sleeping all night. They went away after breakfast next morning. I know nothing of the contrary of their sleeping in the same bed; I never doubted it.

At the second trial, Mrs. *Lloyd* further said — Mrs. *Morris* used to come to my house; Mr. *Morris* I remember coming only once; he came with Mrs. *Morris*, both together. I knew *Harriet Morris*, now *Harriet Davies*; she was not with them on that occasion. They stopped one night, and went away after breakfast in the morning. I do not know to the contrary of their sleeping together. When Mr. *Morris* came down in the morning, I said to him I was very glad to see them so agreeable together; he said he was glad too, or something to that effect. She was not come down stairs then. They left my house both

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together after breakfast. I really cannot tell the time this was.

Cross-examined.—I do not recollect who was the maid-servant at that time. I kept two maid-servants at a time oftener than one. I cannot well tell whether Mr. *Morris* came more than once with Mrs. *Morris*. I am sure I never saw Mr. and Mrs. *Morris* and her daughter with them; I do not recollect that I ever did, but I cannot say that I never did. I went with Mrs. *Morris* up stairs. Mr. *Morris* was down stairs waiting for me to come down as usual. It is the custom; our custom. He went up when I came down. I went to my apartment, and left the maid to show him to the apartment as usual. I have no reason to know of my own knowledge whether they slept in different rooms. I had seven bed-rooms. Two more bed-rooms adjoined the room they lay in. I never thought of anything else, they came so sociable together. I cannot tell whether the visit of Mr. and Mrs. *Morris* was before the period of Mrs. *Morris* having the child or after. I don't recollect ever visiting Mrs. *Morris* when Mr. *Morris* was there. I do not recollect meeting Mr. *Morris* or Dr. *Price* at dinner at Mrs. *Morris*'s.

JOHN WILLIAMS.—I live at *Garth-Llewyd*, as coachman with Mr. *Lloyd*, thirty-six years. I saw Mr. *Morris* of *Argoed* there. Mrs. *Morris* lived at *Llanfair*. I was fetching Mrs. *Morris* on a double horse, and Mr. *Morris* came up to tea; more than that, they drank until ten at night, and then Mr. *Morris* had a boot-jack and slippers, and I saw Mr. and Mrs. *Lloyd* and Mr. and Mrs. *Morris* in the hall; they all went up stairs. I think this was thirty five years back. I saw him next morning, and put his boots at

his bed-room door. I saw Mr. and Mrs. *Morris* next morning in the parlour, and walking together down to *Llanfair*.

This witness, at the second trial, further said—*Betty Roberts*, who is dead, was one of the maid-servants; *Margaret Webster*, who married *Jones* of *Llanfyllen*, was the other maid.

Cross-examined.—I fetched Mrs. *Morris* on a double horse in the morning; she mounted behind me at her own house at *Llanfair*. We got to *Garth-Llewyd* between one and two o'clock. I went back again for Mr. *Morris* after dinner. About four o'clock I took a horse for him; I led one and rode the other. I fetched him from Mrs. *Morris's* house. In the morning I drove them down in a carriage to Mrs. *Morris's* at *Llanfair*; nobody went in the carriage but those two. Mr. *Morris* gave me half-a-crown.

This witness, at the third trial, further said—I took off his boots and cleaned them. I cleaned her boots. I put them at the same bed-room door. In the morning they walked away together. I have seen them before. I have not said I drove Mr. and Mrs. *Morris* away in a chariot. I remember at one time I took them both together in a carriage; this was after. I have often taken Mrs. *Morris* in a carriage. I took them when I drove them to Mrs. *Morris's* house in *Llanfair*.

[Four of the Appellant's witnesses, viz. *Evan Evans* and *Mary Evans*, examined on the first and second trials, and *Ann Arthur* and *Elizabeth Wellings*, examined on the second, were in Court at the third trial, but were not called to give evidence. Most of the other witnesses were examined on all the trials, or the former examinations of such as had

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died before the second or third trial were read on them.]

Evidence for the Respondents :

Rev. RICHARD WALKER, Curate of *Wem* thirty-five years.—I kept a school at *Wem* many years. I have the register-book of baptisms. There is this entry: "*Evan Williams*, a base child, baptized *January* 11th, 1798," in the handwriting of the clerk, *Francis Owen*. There is this note, in the handwriting of Dr. *Smallbrooke*, the late rector: "Supposed of *Austin*, a weaver of this town's son." I knew that *Evan Williams*; he was at my school as a day-scholar; he came 22d *July* 1798; he continued till *Christmas* 1800. When he came to me he was five years and a half old. Old *Austin*, the father of *William*, put him to me. He resided with him. He was entered by the name of *Evan Austin*; he went in the school by that name. He called the old weaver "Our dad," "Our grandad." Old *Austin* paid his schooling. His circumstances were very low. After his death, in 1806, I gave his widow charity, a shilling at a time. She died in 1809.

ANNE OWEN, Widow of a Parish-clerk of *Wem*.—I lived in the same house at *Wem* thirty-five years. I remember *Evan Williams* as a little boy; he lived with his grandfather and grandmother, weavers, and went by the name of *Evan Austin*. They frequently mentioned that he was the son of *William Austin*, their son.

The depositions of Mr. *James Wilding*, taken in the cause (in 1823), and read at the trials.—The plaintiff was at this deponent's school at *High Ercall*, and boarded in the house for four years. He was brought there by *Edward Austin* of *Wem*, and was then be-

tween nine and eleven years. The bills for his schooling were paid by Miss *Careswell*. Deponent supposed they were paid with Mrs. *Morris*'s money. Plaintiff told him she was his mother; that was after she refused to pay for his schooling, which she did, adding, that she had before paid for him out of compassion.

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JOHN EDGERLY, Attorney at *Shrewsbury*.—I was acquainted with plaintiff at Mr. *Wilding*'s school, at *High Erroll*. I was there two or three years with him. He went by the name of *Evan Williams* most generally; frequently *Evan Austin*. He mentioned his father by the appellation of Captain *Austin* (k); that his father had been in battle; that a ball had struck him on his waistcoat pocket, and the dollars in it had saved him.

JOSEPH CLAY, of *Wem*, surviving executor of Captain *Austin*.—I received money from Cox & *Greenwood*, army agents, on account of Captain *Austin*, hardly 100*l*. I think; I paid Mr. *Wilding*, of *Erroll*, for *Evan Williams*'s schooling.

AMBROSE JONES.—I was at school at *Wilding*'s; I knew a young man I have seen to-day (the plaintiff); he was called at school by the name of *Evan Morris* more frequently than by any other name.

MRS. MARTHA TONG.—My maiden name was *Careswell*; I formerly lived at *Mardol Head, Shrewsbury*; that was my home until I was married two years since. I have known plaintiff since 1806. I was at *Wem*, at Captain *Austin*'s. His father and mother lived with him. Plaintiff was fetched from school to see Captain *Austin*, who was then expected shortly to go abroad. *Austin* brought the boy into the parlour. Mrs. *Morris* was with me in the parlour. He said,

(k) *William Austin* obtained a commission in the army in 1794 or 1795.

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“Go and kiss those two ladies.” He did so. Captain *Austin* called him his dear little boy ; and Mrs. *Morris* used to call him *Evan*. He used to call Captain *Austin*, captain and sir. I paid one half year for his schooling with Mrs. *Morris*’s money. Captain *Austin* is dead ; he went abroad some time in the year 1805 ; he desired me to be kind to the boy, and he would be grateful. It was agreed the boy should spend his holidays with me ; nothing agreed as to money. (Captain *Austin*’s will, dated 29th of *April* 1805, and attested by witness and Mrs. *Morris*, was produced, and read ; left all his property to the boy, by name of Evan Williams.) Captain *Austin*’s father and mother were then alive and in poor circumstances. Plaintiff came to my house during his holidays, and talked of him as his father. Plaintiff wrote to me from school, in a note in these words :—“Please to send me a knife and fork, and my father’s paper-case.”

Cross-examined.—I was intimate with Mrs. *Morris* : she used many times to call him a poor little friendless orphan.

This Witness, at the second trial, said, Captain *Austin* told her he felt very uncomfortable about leaving the boy ; that he was the boy’s father ; and he made her promise to receive him during the holidays. Captain *Austin* wrote several letters to witness, during his absence, all about the boy’s schooling, &c. About the time of Captain *Austin*’s sailing, she received a note in the boy’s handwriting in these words :—“Tell me how my father is.” The boy came to her during the holidays, and used to talk of Captain *Austin*. He was put into mourning by witness when Captain *Austin* died.

The same Witness, on the second and third trials, proved the memorandum hereafter set forth

and other entries respecting the plaintiff's birth, &c. to be of his handwriting.

ANN LLOYD, deceased, in her depositions which were read at the three trials, said, she was in the service of Mr. and Mrs. *Morris* in 1787, at *Shrewsbury*, and in that year she hired *William Austin*, by directions of Mrs. *Morris*, to be her footman. Before Mr. and Mrs. *Morris* separated, there were disputes between them about *Austin*. Mr. *Morris* used to say he was too much of a gentleman for him, and used to call him Mrs. *Morris's* gentleman. Mrs. *Morris* was then rather familiar with *Austin*, as Mr. *Morris* was too much against him, and Mr. and Mrs. *Morris* did not live on good terms. After the separation, *Austin* went with Mrs. *Morris* to *Llanfair*, and resided with her till he went into the army, having the management and direction of everything except the rents, which Mrs. *Morris* herself received. Deponent was in her service for about twelve months after she went to *Llanfair*, and slept in the same room and bed with her. *Austin* had a room to himself. One night, while his room was undergoing some repairs, he came without a candle to the room where deponent and Mrs. *Morris* were sleeping, and lay down on Mrs. *Morris's* side of the bed under some of the bedclothes till morning, when deponent got up, and he got up at the same time. Deponent believed nothing of a criminal nature passed between them, but she was asleep part of the time. Some time after that deponent saw Mrs. *Morris* go upon her knees and declare she knew no other man than Mr. *Morris*, and deponent then believed her, never having seen anything in the least criminal. She believed this declaration was made to remove from her mind any impression that *Austin's* coming to the room might have made.

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ELIZABETH LLOYD (formerly *Davies*) deceased, in her depositions read at the three trials, said, she went into the service of Mrs. *Morris* at *Llanfair* in July 1791. She had known her about 18 months before. The first time she saw Mr. *Morris* was in 1792, at *Argoed*. They never lived together as man and wife while she knew them; never saw Mr. *Morris* at or near the abode of Mrs. *Morris*. *Austin* lived in Mrs. *Morris*'s service while deponent was there, but he was treated more like a husband and master; he used to sleep in the best bed-room, shoot, and course, and take his meals with Mrs. *Morris*, sometimes in the kitchen, sometimes in the parlour, but never with the other servants. One morning, in the spring of the year 1792, about nine o'clock, deponent had to go for a breakfast-cloth to *Austin*'s room, the linen being kept there, and she saw Mrs. *Morris* sitting on the side of the bed, in a loose morning dress, and leaning over *Austin*, who was lying in bed. Deponent on seeing them started. Mrs. *Morris* observed, "*Davies*, I have been telling *William* my dream." On one occasion, after deponent had returned with Miss *Morris*, now Mrs. *Davies*, from her father's at *Argoed*, Mrs. *Morris* asked deponent how she liked Mr. *Morris*. Deponent replied, "He was a very nice gentleman." Mrs. *Morris*, after telling *Austin* what deponent said, added, "I wish she (deponent) was bound to live with him as I was, and then she would know what sort of a man he was—God eternally damn him."

EVAN DAVIES, deceased, in his depositions, said, he became tenant to Mr. *Morris* in 1787, on part of the *Llanfair* property, and he received a letter from Mr. *Morris* in 1788, to pay the rents thenceforward to Mrs. *Morris*; she had then come to reside at *Llan-*

fair. Deponent's farm was about a mile distant. One day in 1792, she and *Austin* came on horseback to his house, greatly alarmed, and said to him, that Mr. *Morris* had come to *Llanfair*, and they requested to be let into deponent's parlour, and to be locked in, fearing Mr. *Morris* might come. Deponent did so, and after locking them in, took the key in his pocket the whole day. He went to Mr. *Morris* at *Argoed*, soon after the separation, complaining of losing him for a landlord, when Mr. *Morris* advised him "to get away from Mrs. *Morris* as soon as he could, for she would do him no good," adding, "she had gone to *Llanfair* with a lad whom he had taken out of the streets to clean his shoes." Deponent often saw *Austin* and Mrs. *Morris* at *Llanfair*; he and they used to get drunk together; she used to sit on *Austin's* knees; they used to tickle and play with each other, and then retire together for some minutes, telling deponent not to go away till they came back.

JOHN COLLEY.—I lived with Mrs. *Morris*, in the year 1790, at *Llanfair*, as bailiff, and until October 1792. I did not sleep in the house, but near. I never saw Mr. *Morris* at *Llanfair* in company with Mrs. *Morris*. *William Austin* was doing nothing in the family but what he pleased. Mrs. *Morris* treated him more like a master than a servant. He dined with his mistress, and not like another servant. He was in the best room. He kept his clothes in her room. I have seen her sometimes call him *Billy*, sometimes *William*. He kept dogs, and used to shoot. No repairs were done to the floor while I lived there. Plaintiff is as like *Austin* as two candles. *Evan Evans* did not live with Mrs. *Morris* whilst I was there; he came long after I parted.

On the second trial, this witness pointed out a

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stranger, instead of the Plaintiff, as being like *Austin*. On the third trial, he said he saw *Austin* once dressing himself in the room in which Mrs. *Morris* used to sleep. There was a little passage between her bedroom and *Austin's* room.

DAVID DAVIES.—I was in the employ of Mrs. *Morris* at *Llanfair*. I began about 1792, for from four to five years. I worked a good deal for her in 1792. I never saw Mr. *Morris* at *Llanfair* in 1792. She called him *William Austin* and Captain *Austin*. The servants called him Mr. *William*. He had a tidy room, the best in the house. I saw *William* in bed, and her in the room with him. He was undressed, in his shirt; it was early in the morning of New Year's Day. In our country it is the custom to say, "Happy new year." I saw Madam *Morris* standing first by the bed. I think it was 1791 or 1792. He lay on his back, and Madam *Morris* tickled him. I said "Happy new year," and went away and left them in the room. She spoke unfavourably of Mr. *Morris* when she mentioned him at all.

Cross-examined.—I worked off and on. Mr. *Morris* might come to *Llanfair* without my seeing him.

DAVID HUMPHRIES.—I lived at *Llanfair* near forty years; was vestry clerk the last twenty. I remember Mr. *Morris* and his wife; he lived at *Argoed*, and his wife at *Llanfair*. I knew of but one daughter. I never knew a son. I did some work for her in 1792; taught her daughter to write when she was at *Llanfair* in 1792. Mrs. *Morris* might have lived there three or four years before. He (Mr. *Morris*) might come there without my seeing him. Plaintiff is one of the likeliest to *William Austin* I ever saw. He lived with Mrs. *Morris* until he went into the army. I do not know in what capacity he came, but he lived

like master. I saw him at breakfast, dinner, and supper with Mrs. *Morris*. I have dined there often when he has sat at table. I went once into the kitchen and found nobody, and thought I heard a stir up stairs, and opened a door and saw bed-clothes; and turning to a bed I saw Mrs. *Morris* in bed, who said she was very ill. She desired me to go down. I saw somebody else in the bed. She told me to go out of the room. She opened the door, and began to blame *Ann Evans*, and was very violent for her leaving the house. I never saw Mr. *Morris* at *Llanfair*. I cannot tell whether it was 1795, 1796, or 1797 that I found them in the bed-room at twelve o'clock at night. I rather think it was in 1795. Mrs. *Morris* would get angry if any one spoke favourably of Mr. *Morris*.

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NICHOLAS JONES.—I first knew Mrs. *Morris* at *Llanfair* in 1790. It is thirty-six years since. I remember the funeral of Mr. *Morris*; the family attended, but not *Evan Williams*, the plaintiff. I lived in the *White House*, servant with Mrs. *Morris*; went there in the winter of 1790; cleaned knives and drove the plough. Never saw Mr. *Morris* there. *Austin* slept in the room over the parlour. They lived very happy together, more like husband and wife than mistress and servant. *Austin's* bed-room was about eight or ten yards from Mrs. *Morris's*; there was a passage and a room between their rooms. I could see anybody passing by the passage-window as I lay in bed. I have seen him pass at four o'clock in the morning to Mrs. *Morris's* room. He was in his nightcap. This was in May 1791. Heard talking and bed cracking.

MARY LATHAM.—I lived as servant with Mrs. *Morris* at *Llanfair* from *December* 1790 to the latter

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end of *August* 1792. *William Austin* lived there. He slept over the best parlour. She called him sometimes *Billy*, sometimes *Austin*: made free with him. She told me to call him Mr. *William*. He had the best head of hair I ever saw. She used to comb it and put it into three plaits once or twice a week. I washed his linen. She ironed it, and used to put it into her own wardrobe in her own room. In consequence of some arrangement, on a night when Miss *Davies*, of *Towens*, and Miss *Gwynne* were there, Mrs. *Morris* was to sleep in *Austin's* bed, and *Austin* was to sleep in a room opposite to mine. I went up into *Austin's* room next morning to see if she wanted anything, and I found *Austin* and Mrs. *Morris* in bed together. I cannot say at what time of the year. I was at Mrs. *Morris's* when she was in the family way. She was very large not long before *Christmas*. I heard a report of a child being born not long after this. I used to go to Mrs. *Morris's* to see her after I left her service. The last time I was there *Austin* was out by Mrs. *Morris's* desire. I sat down and leaned on the head of the bed. Whilst I was so *Austin* came into the room; he sat down on the other side. I was not asleep, but Mrs. *Morris* thought I was; and she said, "How could you stay away so long, knowing my situation?" He said, "Hush!" Mrs. *Morris* said, "The girl's asleep." I never saw Mr. *Morris* in my life. I do not recollect any repairs done to the house while I was there.

DAVID JONES. I was witness to this will of *William Morris*. Saw it executed by him, 27th July, 1799, leaving his property to his nephew, to the exclusion of his daughter, and an annuity of 100 *l.* a year to Mrs. *Morris*. He was then displeased with his daughter's marriage.

FRANCIS ALLEN, attorney, produced and proved the deed of separation between Mr. and Mrs. *Morris*. The property thereby assigned to Mrs. *Morris* then produced 200 *l.* a year, and now (the time of the trial) 400 *l.* a year. Witness also produced and proved the last will of Mr. *Morris*, and said, "I prepared his last will of 1st December 1808. He said part of his property was under settlement, and part not. He said it was settled on his male issue, and having no male issue he could not leave it from his daughter. (He had not the deed of settlement.) The other part he should give to trustees, to prevent her having possession of it. He gave all his personalty to trustees for her for her life, and after her death for the benefit of her children. The personalty was about 4000 *l.* or 5000 *l.*, and the real property 500 *l.* (Will read.) He revoked his former will."

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WILLIAM MORRIS, nephew of Mr. *Morris*, the testator, proved the execution by him of an agreement with the Lord of the Manor of *Lempster* and others, for enclosing certain waste lands, dated 20th of *August* 1807, in which the defendant, *Harriet Davies*, was described as "the only child and heir apparent of the said *William Morris*."

MRS. CHARLOTTE MORRIS, widow of the elder brother of Mr. *Morris*.—I was well acquainted with him. I have frequently heard him say he had but one daughter, and never heard him mention that he had a son. I have heard him say he had no other child but *Harriet*. He was not pleased with her marriage at first.

RICHARD REES.—I lived with Mr. *Morris* in the year 1790; staid three years. I never saw Mrs. *Morris* at *Argoed*. Mr. *Morris* used to go to church on a *Sunday* morning to *Clunn*, and return on a

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Monday. He was a man of retired habits. His brother used to return with him. I never heard him mention any son. His daughter used to live with him.

Cross-examined.—My master used to take a ride in the mornings and return at night.

RICHARD BENNET.—I lived with Mr. *Morris* from 1791 for twelve years. He generally went to *Clunn* on a *Sunday* morning. His brother used to call on him. Never heard him say anything about a son. The marriage of his daughter with *Davies* offended him more than twelve months. Mrs. *Morris* came to *Argoed* after that marriage, and before Mr. *Morris* was reconciled to Mr. and Mrs. *Davies*; she staid each time three or four days; she and Mr. *Morris* slept in different bed-rooms.

JOHN BEAUMONT.—I lived with Mr. *Morris* at *Argoed*; went in 1789, and left him in 1792. He used to go to *Clunn* frequently, and to his brother's. He had another brother a mile off. He did not keep much company. I recollect his daughter marrying, in 1799. I went again to live afresh with him before she married. He was very much displeased with her marriage. He said *Davies* had robbed him of his only child and comfort. He never went to *Llanfair*, to the best of my opinion, from 1789 to 1792, during all my first time.

RICHARD NICHOLLS.—I was at *Argoed* at Mrs. *Davies*'s marriage; took meat, being a butcher. Saw Mrs. *Morris* at *Argoed* about three weeks after the daughter's marriage. There were words between Mr. and Mrs. *Morris* when in the parlour; and I was in the kitchen, and heard what passed in the parlour. Heard Mr. *Morris* accusing Mrs. *Morris* about a child. She said she never had any other child but *Harriet*. She said that she wished the devil might

take her if she had any child but *Harriet*. She used the expressions more than ten times ; this was in 1799.

WILLIAM JONES, and ANNE, his wife, both deceased, in their depositions, said, they were both in the service of Mr. *Morris*, in the year 1799, when Mr. and Mrs. *Davies* were married. He was very angry with them. Mrs. *Morris* was twice at *Argoed* after the marriage, and staid three or four days on each occasion. She and Mr. *Morris* had separate bed-rooms at different ends of the house. She never was at *Argoed* after Mr. *Morris* was reconciled to Mr. and Mrs. *Davies*.

RICHARD BAXTER, surgeon.—I was apprenticed to a surgeon in *Shrewsbury*, in 1786. I knew Mr. *Morris* there. He was a surgeon and man-midwife ; his practice was not extensive ; he did not like his profession. I saw Mrs. *Morris*, but was not much acquainted with the family. I went to settle at *Montgomery* in 1790 ; and from 1792 I attended professionally on Mr. *Morris*, then residing at *Argoed*. In 1808 I mentioned to him a report I heard of a son of Mrs. *Morris*. In August of that year I received a letter from Mrs. *Morris*, inclosing a letter for Mr. *Morris*. I took it to him and he would not receive it ; he desired me to throw it in the fire. I told him I heard he had a son. He said he never had a son. I mentioned Mrs. *Morris* having a son. He said he knew no such thing, and he spoke of his daughter as his only child, and he declared he never had any conjugal connexion with Mrs. *Morris* since they separated.

Cross-examined.—Mrs. *Morris* was a very fine woman, and desirable, and I believe very fond of company.

MARGARET JONES. (*l*)—I formerly lived with Mr.

(*l*) This and the next witness were called for the purpose of contradicting Mrs. *Lloyd*, and *Williams*, her coachman, witnesses for the Appellant : see pp. 189-90-91, *supra*.

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Lloyd, of *Garth-Llewyd*, for seven years. I left thirty-one years last *May*. I was like a house-maid there; made the beds. I did not know Mr. *Morris*. I knew Mrs. *Morris*; she used to come sometimes on a visit in the evening. She never slept there whilst I was house-maid to my recollection. I conducted ladies to the bed-rooms always. No gentleman came with Mrs. *Morris* to my knowledge whilst I was there. *Mary Jones* succeeded me when I went away.

Cross-examined.—They had a good deal of company in my master's time, and I do not pretend to recollect who came there. I do not remember that Mrs. *Morris* slept there. I have no recollection of Mr. *Morris* coming there, and never heard of his name.

MARY JONES.—I succeeded the last witness as house-maid at *Garth-Llewyd*. I remained there eight years. I once saw Mr. *Morris* of *Argoed* there. Mrs. *Morris* was with him that day. They came by dinner-time, now from eight and twenty to nine and twenty years ago; they staid all night. They slept in two rooms. There was a large passage between the two rooms: no communication. I lighted Mrs. *Morris* to her room. Mrs. *Morris's* daughter was with her on that occasion. Her daughter slept with her. I am sure Mr. *Morris* did not sleep with her that night.

CHARLES MICKLEBURGH.—I have a memorandum in the handwriting of the plaintiff upon a leaf in this pocket-book. He had been making inquiries about his birth in the winter of 1811. (The memorandum was read, and was this: "I was born at the *White House* at *Llanfair*: when born, on a *Saturday*, market day, my father came trembling, and saying, *Ann*, what shall I do? Don't be afraid, we shall do very well. As soon as I was born, I was kept warm

by *Ann*, and taken into the malthouse; given to my father to hold while she got the horses ready, and sent *Ann* on, and he followed at edge of night; and *Ann* rode within a mile of *Wem* before she alighted, and then gave me to my father whilst she fetched Mrs. *Austin* to fetch me to *Wem*; and they both turned back, and got to *Llanfair* at night next day, when she went to many shops to buy things, that people may not think she had been out. Mrs. *Morris* at that time kept her bed. She took a flasket of wine and biscuit for me on the road. Miss *Gwynne* was not present at my birth; but backwards and forwards at that time, and knew of it: and when Mrs. *Morris* and her fell out, she asked her, "Where is the child without a father?"

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Cross-examined.—The pocket-book was left in the office in which the plaintiff was my fellow clerk. I told Mr. *Watson* (plaintiff's attorney) last year, that I destroyed the memorandum. I told Mr. *Davies* of it in the spring of 1825. I sent a copy of it to Mr. *Watson*.

WILLIAM JONES (*m*), a blacksmith at *Llanfair*.—I helped to do work at Mrs. *Morris*'s house when it was repaired in 1788. It was done in *May*, the first spring she came. I have seen *Richard Ellis*, then a little boy. I went in 1788, and stayed there one year. *David John* was doing jobs in the cooper's line after this job was finished; and I was about thirteen when I went there. *Ellis* was less than me, about nine or ten years old. I am talking of repairs to the *White House*.

JOHN LLOYD.—I was employed to do some repairs at Mrs. *Morris*'s house at *Llanfair*, in 1788. *John*

(*m*) This witness and the next were called for the purpose of contradicting *Richard* and *Jane Ellis*: see pp. 177-8, *supra*.

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Ellis was there. I saw a little boy, *John Ellis's* son; *Richard* was the name.

Mrs. PAYNE.—I live at Oswestry. *Mary Evans* rented a house of my husband next door to us. I asked her who she would be for, and she said for young *Austin*. I heard her say, “If *Austin* got, she was to have 60*l.* per year for life.” She always called him young *Austin* to me. She told me Mrs. *Morris* had a child by *Austin*, after parting some time from her husband. My son *Richard* and my husband were both present when she said she was to have 60*l.* per year for life.

Cross-examined.—I said to her, they gave you a great trouble, and you have been in *London* twice, and I hope you will get well paid. I never told her, if I was her, I would have 60*l.* a year. I remember *Nicholas Jones* being at our shop, and saying he would pay her rent, if required. She went on in such a manner, I never thought well of her discourse.

RICHARD PAYNE, step-son to last witness.—I remember *Mary Evans* living at *Oswestry*. I heard her say that if *Austin* got, she was to have 60*l.* a year for life. Mrs. *Payne* was present at the time. This conversation was after her return from *London*.

MARY JONES, of Oswestry.—I lived there when *Mary Evans* lived there. I heard her say if young *Austin* gained she was to have 60*l.* a year for life, and also 200*l.*

ELIZABETH JONES.—I lodged with *Ann Evans* at *Llanfair* a little after *May*, when I went, and remained till the following *May*. I am not quite sure of the year. *Mary Evans* married in *August*, about three months after I left the house. I left in *May*. I do not remember the month she married. I am sure I did not see *Mary Evans* during the time that I lodged

there. She could not have been there one hour without my seeing her. I was at home day and night. Three children were at home, and I was to look after them for *Ann Evans*. I used to spin mostly.

WATKIN DAVIS, apprentice to *Edward Evans*, the husband of *Ann Evans*.—I slept at my father's; spent the day at my work with *Edward Evans*. I lived with him two years and a half. I lived for twelve months in *Ann Evans's* house. Had two rooms. Remember *Mary Evans's* marriage. I left, at *May*, *Ann Evans's* house. I was there a twelvemonth, from *May* to *May*. I was a skinner. At home all night, and at work in the day. I did not see *Mary Evans* in that year. It was impossible for her to be there eight or nine days without my seeing her. She might come at night, but I never saw her in the daytime. I worked at the house, but slept at my father's.

FIELD EVANS, half-brother of the husband of *Mary Evans*.—I remember her living with my father. She came in *May* 1791, and lived till *May* following. I was living with my father the whole of that year. I do not remember her meeting with any accident from a cow that year. She was not absent from my father's service during any part of that year.

Cross-examined.—About thirty-five years ago I was with my father on the farm; then about twenty-one. I am now fifty. I attended fairs sometimes for my father, but never staid out at nights. I will swear, at distance of thirty-five years, that I was never out a week during that year. The servants visit by chance. I will not swear that *Mary Evans* did not go on a visit to her mother during that year.

Re-examined.—I never missed her to my recollection. She might have been absent for two or three

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days; she could not have been absent ten days. She was married to my brother in 1792.

The last six witnesses were examined at the second trial of the issue for the purpose of contradicting, or lessening the effect of, the testimony of *Mary Evans*, one of the Appellant's witnesses on the first and second trials. Most of the other witnesses for the Respondents had been examined on interrogatories in the cause, and such of them as were living were examined at all the trials, and the depositions of those that had died were read.

At the second and third trials, after the case for the Respondents had closed, the following witnesses were called for the Appellant, for the purpose of contradicting the Respondent's witnesses who said that the Appellant was like *Austin*.—

Captain TUCKER STEWART.—I was first lieutenant of the 90th regiment of foot. *William Austin* was ensign, then lieutenant. I knew him intimately. Saw him daily. He was appointed to my company. I was at the assizes at *Shrewsbury*. I saw the plaintiff in court. I saw no resemblance between plaintiff and Captain *Austin*. I saw Captain *Austin* last time in 1795. Never saw plaintiff till accidentally at *Shrewsbury*.

Mr. GEORGE WALMESLEY.—I lived at *Wem*. Knew the late Captain *Austin* well, and knew plaintiff from a boy. I do not think that there is the slightest resemblance between them.

Lieutenant CHARLES PRINCE.—I knew Captain *Austin* well. I was at *Shrewsbury* last year. I thought the plaintiff not a likeness in the least. I saw Captain *Austin* often. First time in 1799; and last in 1805.

The Appellant's Counsel, in his reply, read from the Appellant's pocket-book (mentioned in the evi-

dence of Mrs. *Tong* and Mr. *Mickleburgh*), the following passage in the Appellant's handwriting, on the leaves of that book, in 1810:—

“ Mr. *Wilding* has received a letter from Mr. *Kiffin* to entreat me to go. Shall be in the habit of going about *Llanfair* a good deal. I shall have frequent opportunities of hearing and inquiring a good deal in the circumstances, when, if I hear anything that will tend to any advantage, I will be sure to acquaint you of it; and in all probability shall see *Ann Evans*, most likely very soon. Will act according to your admonition.”

And he contended that this explained the other entry to be an account of what he had learned from *Ann Evans*.

The *Lord Chancellor*, after considering the whole of the evidence, delivered the following judgment:— This case has been long depending in this Court. The Bill was filed in the year 1812, and at the hearing an issue was directed, on the trial of which a verdict was found for the plaintiff. An application was made for a new trial, and it appeared to the Court, upon adverting to the evidence, and other circumstances connected with the manner in which the question was put to the jury, that it was a proper case for a new trial. There was one of the witnesses whose evidence, if believed, would have put an end to the case, but the Court had reason to think that there existed ground for doubting whether the evidence which she gave was correct, and it was put to the second jury, to say whether or not they believed her testimony. Upon the second trial the jury were of opinion that she was not entitled to credit, and they found a verdict for the defendant. The case went

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down to a third trial, the jury were divided in opinion, they came to no conclusion, and they were discharged. The result was an application for a further investigation, and it was at last agreed by counsel at the bar, that, for the purpose of saving further expense and delay, the application for a new trial should be abandoned, and that the case should be left upon the whole of the evidence, as well on the trials as in the cause, to my decision. I have accordingly read and considered it with attention, and I am now to state the effect of that evidence, as connected with the law applicable to this subject, and the conclusion which I have formed from the whole of it.

The facts of the case, as I recollect them, are these:—It appears that Mr. and Mrs. *Morris* were married in the year 1778; they resided at *Shrewsbury*, where he practised in the medical profession. About 1788 they separated, and articles of separation were drawn and executed, in which it was recited, that in consequence of unhappy differences existing between them, they had agreed to live apart. A provision for Mrs. *Morris* during her life having been made by those articles, she went to reside at *Llanfair*, and after some little time Mr. *Morris* went to reside at a place called *Argoed*, fourteen or fifteen miles distant from *Llanfair*. It does not appear, although these parties separated, that they were in a state of decided variance and hostility with each other. A young man of the name of *William Austin*, who had been taken into the service of Mr. and Mrs. *Morris*, as Mr. *Morris* described it, “to clean his shoes,” was suspected of some familiarity with Mrs. *Morris*; he accompanied her, together with other servants, to *Llanfair*; but notwithstanding that circumstance, some intercourse still continued to be kept up between Mr. *Morris* and

his wife. The impression upon my mind, from the evidence, is, that the extent and the nature of that intercourse have been much exaggerated by the witnesses on the part of the plaintiff. I cannot help looking at the evidence as to this point with a considerable degree of jealousy and suspicion. When I find, upon the first trial, a witness deposing to certain facts, which, if established, would have been decisive of the cause, and the same witness afterwards, upon a subsequent trial, wholly discredited by the jury, and further, that upon the successive trials which have taken place, witnesses have been called on one trial to material and important facts, and upon a subsequent trial, those witnesses have been withdrawn from an apprehension that their former evidence might be contradicted; for that indeed was avowed at the bar. These circumstances, therefore, together with the testimony on the part of the defendant, as to the character of Mr. *Morris*, his retired habits, his disposition to live constantly at home, lead me to consider that the evidence with respect to the extent and the nature of the intercourse between Mr. and Mrs. *Morris*, after their separation, has been considerably exaggerated. Some facts, however, are incontrovertible, or, at least, are established to my satisfaction, that Mr. *Morris* was in the habit of going over, from time to time, from *Argoed* to *Llanfair*, while Mrs. *Morris* resided there; and that upon some of those visits he, in company with her, gave directions with respect to the conduct and management of the property. There is also sufficient evidence to satisfy my mind, that on more than one occasion he was in her house, and that he sometimes walked with her. I cannot, according to my impression, carry the evidence beyond the circumstances which I have stated. Mr. *Morris* was

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living fifteen miles off, at *Argoed*: *Austin*, who had accompanied Mrs. *Morris* to *Llanfair*, continued to reside for many years in her service; he remained in her service until he entered the army. In the spring of the year 1792, Mrs. *Morris* became pregnant; that pregnancy was not communicated to Mr. *Morris*; she endeavoured to conceal it, as far as she was able. About the close of December 1792, she was delivered at night of a male child; and there is sufficient evidence of identity to satisfy me that that male child is the present plaintiff. Immediately after she was delivered, the man who had the care of the horses was sent out of the way. The child was wrapped carefully in flannel; two horses were taken out of the stable; a woman of the name of *Ann Evans*, who assisted at the delivery, and *Austin*, who was present about that time, and in the house, and who is described as being in a state of considerable agitation, mounted those horses and set off with the child towards a place called *Wem*, about thirty miles from *Llanfair*; when they arrived within a short distance of *Wem*, the woman, *Ann Evans*, was left upon the road with the child, while *Austin* rode on to his father's house, who was a weaver, carrying on business at *Wem*; Mrs. *Austin*, the mother of *Austin*, came and received the child, and *Austin* and *Ann Evans* returned to *Llanfair* with as much expedition as they could use. On their arrival there, it appears that *Ann Evans* was anxious to go about and show herself as much as possible, that no suspicion might be entertained of her absence. Thus the greatest care appears to have been taken, at the risk even of exposing the life of the child, to conceal the circumstance of Mrs. *Morris*'s delivery. The child was shortly afterwards baptized at *Wem*, by the name of *Evan Williams*, and was described as a "base-born

child." He continued for a considerable time in the house of Mr. and Mrs. *Austin*, the father and mother of *William Austin*. When he had attained the age of five or six years, he was put to school by the name of *Evan Austin*, with a gentleman of the name of *Walker*, the clergyman of the place, and he was maintained at the expense of Mrs. *Morris*. The child was afterwards removed to a school at *High Ercall*; he was there called by the name of *Evan Williams*, by which he had been baptized, but was described also by the name of *Evan Austin*. Mrs. *Morris* from time to time saw the child, and treated him as her son, and during the whole of this period he was treated and obviously considered by *Austin* as his son. *Austin*, before he left *England* (for he afterwards went to the *West Indies*), made his will. He was possessed of some little property; his father and mother were in low and distressed circumstances; yet by that will, passing over his father and mother, he disposed of all his property in favour of this boy. He then went to the *Isle of Wight*; while there he corresponded with one *Martha Carswell*; several of the letters are in evidence, and the whole of that correspondence shows that he considered this boy as his son. He went to the *West Indies*, and in the course of about two years died there. The news of his death arrived in this country, and was communicated at the school, and the boy was put into mourning as the son of *Austin*. The evidence is clear and satisfactory, as to *Austin* living in a state of adultery with Mrs. *Morris*; the pregnancy was concealed, the birth was industriously concealed, *Austin* was acting in that concealment. No communication whatever of any of these circumstances was ever made to Mr. *Morris*; Mr. *Morris* knew nothing of the delivery of

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Mrs. *Morris*; he knew nothing of the birth of this child; he lived for seventeen years afterwards, considering his daughter *Harriet* as his only child. In the year 1799, *Harriet* married Mr. Davies without his consent; he was incensed against her, and made a will, by which he disposed of his whole property in favour of a nephew. In the year 1807, he was a party to an instrument in which he described *Harriet Davies* as his only child and heir at law. In the year 1808, having been reconciled, he disposed of his property in favour of her and her children, and no notice whatever was taken by him of any other child. It appears, indeed, that in a conversation which he had with Mrs. *Morris*, in the year 1799, he stated some reports which had accidentally reached his ear, of her having had a child, which she vehemently and peremptorily denied. The child, therefore, was recognised on the one side as the child of *Austin*, on the other no knowledge whatever of such a child having been born ever reached Mr. *Morris*; the existence of such a child was never communicated to him; in no one instance did he act upon the supposition of there being such a child; there was nothing but that vague report, which was instantly contradicted by Mrs. *Morris*.

The question is, whether, under these circumstances, the plaintiff has made out his claim to be the legitimate son of Mr. *Morris*. There is no doubt or difficulty, as it appears to me, with respect to the law applicable to this question. It was stated distinctly and clearly by the Judges in the case of the *Banbury* Peerage; and I consider the opinion expressed upon that occasion, not as laying down any new doctrine, but as arising out of and founded upon the previous decisions. On that occasion, the Lord Chief Justice

of the Common Pleas stated the unanimous opinion of the Judges in these precise terms :—“ That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse the husband could, according to the laws of nature, be the father of such child.” The question therefore is a question of fact, whether sexual intercourse took place in the spring of the year 1792 (for that is the period to which reference must be had) between Mr. and Mrs. *Morris*? In the absence of all evidence, either on the one side or on the other, the law would presume that such sexual intercourse did take place. It was argued at the Bar, that the doctrine contained in the opinion which I have stated has been affected by a case which was decided in this Court, the case of *Head v. Head*(*n*). In truth, however, *Head v. Head* does not in the slightest degree affect the opinion delivered by the learned Judges in the case of the *Banbury* Peerage. It recognizes and adopts that opinion, and all that is said by the present Master of the Rolls, is, that the Court which is to be satisfied that sexual intercourse did not take place, must be so satisfied, not upon a mere balance of probabilities, but upon evidence which must be such as to exclude all doubt, that is, of course, all reasonable doubt in the minds of the Court or jury, to whom that question is submitted. Therefore, in deciding this case, I look upon it, that the point to which I am to direct my

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(*n*) 1 Sim. & Stu. 150, and Turn. & R. 138.

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attention, as a question of fact, is this : whether the circumstances are such as to satisfy me that no sexual intercourse did take place between these parties, at the period to which reference is had ?

In addition to the intercourse between the parties at *Llanfair*, which I have already taken notice of, I ought to advert to two other circumstances which have been relied upon. One is the visit to Mrs. *Lloyd*, at *Garth-Llewyd*. Mrs. *Lloyd* proves, that at the time when these parties were separated, the one living at *Llanfair*, and the other at *Argoed*, they paid her a visit at *Garth-Llewyd*. She says they passed the evening and the night at her house, and she supposes they slept together. In her evidence in the cause in this Court, she states that visit to have taken place "about twenty years ago, or more, but that she cannot be precise with respect to the time." That would carry it back to about the year 1800. When she was examined at the trial, she could mention no time to which that visit was to be referred. The coachman was called, and he referred the visit precisely to the spring of 1792 ; he stated it to have been thirty-seven years ago, from the period when he was examined upon the last trial. There does not appear to be any thing to guide his recollection as to a transaction which took place so long ago, so as to enable him to fix it with any degree of certainty at that period, at least no circumstance having that tendency was stated, and it is extraordinary that he should have hit upon the particular period, which would so exactly have accounted for the pregnancy which gave birth to this child. It is observable that he is contradicted as to the time of the visit by Mrs. *Lloyd*, at least he does not agree with her. He is also contradicted by the two females who lived in Mrs. *Lloyd's* house successively as ser-

vants, the one immediately following the other; both of these witnesses state distinctly that no such visit did take place at the time alluded to, and one of them mentions that a visit did take place in 1798, when Mr. and Mrs. *Morris* slept there in different rooms. For these reasons I pay little attention to the evidence of the coachman; though I consider it as a fact, that these parties, at some period during the separation, probably about the year 1799, when something like a reconciliation appears to have taken place, went and passed the evening and the night at Mrs. *Lloyd's*, at *Garth-Llewyd*. The other circumstance connected with the intercourse between Mr. and Mrs. *Morris*, which I ought also to notice, is this, that in the year 1799, at the period when disputes took place, in consequence of the marriage between *Harriet Morris* and her present husband, and when dissatisfaction was felt by Mr. *Morris*, in consequence of that marriage, Mrs. *Morris* appears to have gone over to *Argoed*, and to have passed some days at the house of Mr. *Morris*, on two different occasions. The witness who was examined, gave evidence, that at that time, Mrs. *Morris*, although she had passed some days at the house, slept in a distinct and separate part of the house, and did not pass the night with Mr. *Morris*.

Having noticed these two circumstances, which I ought to have stated when I was speaking with respect to the intercourse between these parties, I come back to the question of law. I have stated the opinion delivered by the Judges in the *Banbury* Peerage case; I will now refer to what was said on that occasion by Lord *Redesdale*. That most learned, able, and acute lawyer expresses himself thus (o): "I admit that the law presumed the child of the wife of A,

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(o) *Le Marchant's Gardner* case, Appendix, pp. 437-9; Sir H. Nicolas' *Treatise on Adulterine Bastardy*, pp. 462-4.

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born when A might have had sexual intercourse with her, or in due time after, to be the legitimate child of A ; but this was merely considered a ground of presumption, and might be met by opposing circumstances. The fact, indeed, that any child is the child of any man, is not capable of direct proof, and can only be the result of presumption, understanding by presumption, a probable consequence drawn from facts, either certain or proved by credible testimony, by which may be determined the truth of a fact alleged, but of which there can be no direct proof." He also says, " It is therefore of high importance to consider, in a question of legitimacy, whether the fact of such acknowledgment as would demonstrate the legitimacy did take place, or whether by circumstances such acknowledgment was rendered impossible, as, by the child being a posthumous child. If, on the contrary, it appears that the supposed father was ignorant of the birth of such a child, and that the fact of its birth was concealed from him, such concealment is strong presumptive proof that there had existed no sexual intercourse which could have made him the father of such a child." Lord *Ellenborough's* opinion, though delivered in more general terms, coincides with that which was given by Lord *Redesdale* ; and these were followed by the opinion of Lord *Eldon*, to the same effect. Lord *Erskine* considered it necessary to prove the actual impossibility of sexual intercourse having taken place ; but no lawyer will now contend that that opinion can be supported. The case comes back, therefore, to the question of fact ; about the law there is no doubt. Are the circumstances of this case such as ought to satisfy the person who has to decide upon it that sexual intercourse did not take place between Mr. and Mrs. *Morris* in the spring of 1792 ?

Having already stated the facts of the case, I shall not repeat them, but shall merely refer to them. Mr. and Mrs. *Morris*, though separated, had, to a certain degree, communication with each other. It must, however, be remembered, that at that time *Austin* was carrying on an adulterous intercourse with Mrs. *Morris*. It must also be remembered (for that occurs in the evidence of many of the witnesses), that Mrs. *Morris* had a personal dislike to her husband, which she expressed in the strongest and coarsest terms. These things are not to be omitted in considering the question whether sexual intercourse did or did not take place between them, notwithstanding the separation. When Mrs. *Morris* became pregnant, she made no communication of that circumstance to Mr. *Morris*; no reason in point of evidence has ever been assigned for that concealment; she was exposing her character without necessity, if sexual intercourse with her husband had taken place. At the time when the child was born, the birth of that child was concealed; it was industriously and carefully concealed, and concealed from Mr. *Morris*, and *Austin* was acting in that concealment. What reason can be assigned, or, in point of evidence, has been assigned for this conduct, except the desire that the fact should not be known to Mr. *Morris*? Mrs. *Morris* was hazarding her reputation; she was endangering the life of her child; she was depriving that child of its prospects as the heir of Mr. *Morris*, and she was giving it only the hope of being the heir of a person who was destitute of property. Surely these are circumstances so strong, that they ought to be encountered by some evidence tending to show a probable reason why that concealment should have taken place. It was not a mere momentary act; it was followed up through-

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out. The mother allowed the child to be removed from her, and to be christened as "a base-born child." She allowed it, during the lifetime of *Austin* up to the period of his death, to pass as the child of *Austin*. When she was charged, in consequence of some reports, with having had a child, she strongly denied the accusation; and during the seventeen years that Mr. *Morris* lived, she never whispered to him that she ever had any other child than *Harriet Davies*. I require, then, when I am coming to a conclusion of fact as to whether or not sexual intercourse did take place between these parties—I require some reasonable and satisfactory ground upon which that concealment can be explained. What is the representation which this plaintiff himself gives of all these transactions, as collected by himself, the result of his own inquiries? It was proved on the last trial, and is in evidence in the cause. (His Lordship read the contents of the memorandum as given in evidence (*p*.) This is the history of the transaction, as collected by the plaintiff himself in the inquiries which he had made upon the subject, and which was contained in a book in his own handwriting.

I have endeavoured, in the course of the argument, to obtain some reason for this concealment. It was said at the bar that it might be referred to this circumstance: that Mrs. *Morris* was not fond of Mr. *Morris*; that she disliked him; that she wished to continue to live separate from him; and that she might have supposed, if the circumstance had been communicated to him, it would have affected the separation. This, however, is an argument against the probability of her having permitted sexual intercourse to have taken place between them. But the argument is also inconsistent with the statement she her-

(*p*) *Vide ante*, pp. 204-5.

self made, as proved by the evidence of Miss *Gwynne*, whom she compelled to go down upon her knees and to promise that she would keep the affair concealed. It is quite inconsistent with the particular declaration she at that time made, and to which declaration I refer, not for the purpose of proving that the child was the child of *Austin* (for it cannot be made use of for that purpose), but for the purpose of negating the speculative reason which has been assigned at the Bar for the concealment.

Again, it has been suggested at the Bar, that as she was attached to *Austin*, she might not wish him to be apprised of that species of infidelity on her part, her having a connexion with her husband; but to adopt such a view of the transaction, would be to forget the character of the parties; it would be to suppose a degree of refinement, altogether incompatible with the established facts, to have existed in the intercourse between these persons—persons who appear by the evidence to have been of the coarsest character as to morals and conduct. Such a theory is of too speculative a nature for the Court to adopt it as an ingredient in its judgment. The concealment, coupled with the other circumstances of the case, and the utter ignorance in which Mr. *Morris* was kept to his death, a period of seventeen years, with respect to this transaction, satisfies me, as a conclusion of fact, that no sexual intercourse did take place between Mr. and Mrs. *Morris* at such a period as could have rendered the child the offspring of Mr. *Morris*.

In giving this judgment, I affect no rule of law; I state the rule as I find it. It is founded on sound sense; and I, as I am bound to do, acquiesce in it. I have come, like a jury, to a conclusion of fact. The circumstances of the case are such as to lead me to that conclusion which I have stated, not, as I think,

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upon a bare balance of probabilities, but as the result of the thorough conviction of my mind, founded upon a careful and patient attention to all the evidence in the case. I am bound, therefore, having this impression of the facts, to state my opinion, that the plaintiff is not entitled to the property in dispute as the son of Mr. *Morris*(*q*).”

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When the Appeal against this judgment came to be heard the first time,

The *Attorney-General* and Mr. *Temple*, for the Respondents, took a preliminary objection, insisting that no appeal lay from a decree, to which all the parties by their counsel consented to submit, in order to save the expense and delay of another trial at law. The parties could not be then placed in the same relative situation for a new trial, if the decree should be reversed.

Mr. *Spence* and Mr. *Whateley*, for the Appellant:—There was no evidence of consent on the face of the decree. A petition had been presented to the House by the Appellant in the year 1834, praying their Lordships to order the Judges to attend at the hearing of the appeal. The Appeal Committee, to whom that petition was referred, reported that the cause was a fit case for the attendance of the Judges. In pursuance of that report, the House, in March 1835, appointed a day for hearing the appeal, and made an order for the Judges’ attendance. That order was soon afterwards discharged, but the appeal was subsisting. This objection should have been made, if made at all, before the appeal was set down for hear-

(*q*) This judgment was printed with the cases. It has been examined with a copy corrected by Lord *Lyndhurst*, in Sir H. Nicolas’ Treat., p. 229; in which also, at p. 219, is his Lordship’s judgment directing the second trial of the issue.

ing, or a petition should have been presented to the House to rescind the order for setting it down. The objection came now too late, after the Appellant had incurred all the expense. None of the parties, nor their counsel, could have supposed at the time they consented to take Lord Chancellor *Lyndhurst's* decision on the evidence, instead of going to a new trial, that they were to be precluded from appealing against that decision. There was no such contract entered into or suggested at the time. An objection of this sort was made and overruled by their Lordships in the case of *Attwood v. Small*(*r*); and it ought not to be allowed to this appeal, either as to the form or the merits.

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Lord *Lyndhurst* :—When I proposed to the parties to decide the question upon the evidence they were to lay before me, instead of sending it again for trial before a jury, I did not consider that my decree was to be exempt from appeal. I never contemplated such a consequence. The saving of expense and further delay was my object.

The *Attorney-General*, in reply :—The Respondents did present a petition against the appeal. The Appellant does not now pray *a venire de novo*, for he consented that there should not be a new trial; but he prays a reversal of the decree. If the decree should be reversed, must there not be a new trial? Most of the witnesses being dead, the parties cannot go to trial with the prospect of any beneficial result.

The question in the appeal depending entirely on disputed facts, and the evidence consisting of the Judges' notes, all which were before Lord *Lyndhurst*, but not laid on the table of the House, their Lordships could not hear the appeal without that evidence.

The *Lord Chancellor* :—The House cannot entertain

(*r*) To be soon reported.

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the objection to the regularity of the appeal. That objection was disposed of by the Appeal Committee upon evidence which is not before the House. We have only the record of the decree before us, and on that no consent appears not to appeal. If it were alleged that the appeal is brought in breach of good faith, the House might put off the hearing until the objectors produce proof of that allegation. It is admitted that there was a consent, but how far it was meant to extend is the matter in dispute. It nowhere appears that the parties agreed that the decree should be final and conclusive.

As to the objection that the evidence is not before the House, if the appeal is to be heard, the parties cannot refuse to bring in the whole of the evidence that was before the Lord Chancellor in making the decree.

Lord *Devon* concurred in the Lord Chancellor's view of the question. If the appeal was to be heard, their Lordships should have all the evidence in the cause in the court below, and the Judges' notes of the evidence at the trials.

Lord *Lyndhurst* said he had full copies of the Judges' notes, and could furnish them if the parties would consent that the appeal should be heard on the merits.

Lord *Devon* :—Or we may order the Judges to give us their notes. That is a novel course, but not illegal.

The *Lord Chancellor* :—The House is to have before it all the documents that were before the Lord Chancellor, and what they were, the recitals in the decree will best show.

An order was made that all the evidence and documents that were before Lord *Lyndhurst* when he pronounced the decree should be printed and laid before the House; and the hearing was adjourned.

Mr. *Spence* and Mr. *Whateley*, for the Appellant: (s)
 —This suit was instituted in 1811, and it is not the Appellant's fault that it has not long since been brought to a termination. The delay, for the first twelve years, was entirely caused by the Respondents' keeping *Ann Evans* out of the way, as was fully proved by their own letters and by witnesses produced on the trials. The removal and concealment, for so many years, of the only witness who could prove the birth and identity of the Appellant, afford strong reasons to suspect that the Respondents were well aware of his legitimacy, especially when it appears that Mrs. *Morris*, the mother, whose animosity towards her child was evinced on every occasion, was leagued with them in that conspiracy. The depositions of *Ann Evans*, though given with reluctance, not only prove the birth and identity of the Appellant, but also, together with the evidence given at the trials by *John Evans*, *William Hughes*, *Richard* and *Jane Ellis*, *Evan Jones*, *Robert Lloyd*, and Mr. *Hassell*, unimpeached witnesses, confirmed by *Margaret Roberts*, *Oliver* and *Ann Williams*, clearly prove access of the husband and wife. That is one feature of this case, distinguishing it from the *Ban-*

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(s) Mr. *Spence*, before he opened the Appellant's case, referred to the order which had been made at the recommendation of the Appeal Committee for the attendance of the Judges, and afterwards discharged, and said the Appellant was anxious that the Judges should be present, as the case involved important questions of law, and he had presented a petition to restore the order for their attendance.

The *Attorney-general* answered, that he had no objection to have that order restored; it was discharged because the opinion of the Judges on the law of this case had been already given to the House in the *Banbury* Peerage case.

Lord *Brougham*:—This is an appeal on questions of fact and of law; should any point arise in the course of the hearing requiring the assistance of the Judges, we can frame a question for them. It is not usual to ask the House to call in the Judges, as that would imply that the House itself is not competent to decide the case.

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bury Peerage case, in which it was held that there was no evidence of access.—[Lord *Lyndhurst*: What is meant by access?]—Such access as warrants us to infer that sexual intercourse took place.—[Lord *Brougham*: Generating access is the expression used by Lord *Stanhope*, in the *Banbury* case (*t*).]—From the evidence of these and other witnesses for the Appellant arises such a presumption of sexual intercourse as can be repelled only by proof that no such intercourse took place. *Elizabeth Wellings* and *Ann Arthur* might have proved, and *Richard Ellis* did prove, that Mr. and Mrs. *Morris* were together about the time the child must, in the course of nature, have been begotten. The noble Lord who pronounced the decree admitted that they had been often together at *Llanfair*, and also at *Garth-Llewyd*. *Rowland Mills*, as well as *Richard Ellis*, has proved that Mr. and Mrs. *Morris* were together at *Llanfair* at a time corresponding with the birth of the child. Mrs. *Lloyd* gave such evidence as leaves no reasonable doubt that they slept together the night on which they dined at her house. The time of that visit is fixed by other witnesses. The two servants, *Margaret Jones* and *Mary Davies*, are not more entitled to credit than Mrs. *Lloyd*. They may have forgotten the facts after leaving the service, or they may have referred to a different visit, for Mrs. *Morris* and Mrs. *Lloyd* frequently visited each other. One of the servants said that she never saw Mr. *Morris* at Mrs. *Lloyd's*; the other said he came with Mrs. *Morris*, and they slept in different rooms, and Miss *Morris*, their daughter, was with them, while Mrs. *Lloyd* says the daughter was not with them on that occasion. They had on that oc-

(*t*) *Le Marchant's Gardner* case, App. 429.

casion, and also when they were together at *Llanfair*, opportunities of sexual intercourse, and if such intercourse took place between them about the time the child was begotten, the presumption of law is irresistible that the child is the husband's, although, in fact, he may be the child of the adulterer. When an opportunity of sexual intercourse between husband and wife is shown, and the husband capable, and a child is born of the wife at a time when that child might, in the course of nature, have been begotten at that opportunity, the presumption of law that sexual intercourse did then take place between them cannot be rebutted by any evidence whatever. Of Mr. *Morris's* capability there cannot be a question; he had a child by his wife during their cohabitation; he was a young man, not above 45, when the Appellant was begotten. Mrs. *Morris* was under 32, and it is in evidence that she was a most tempting and desirable woman; she was heard to declare a dislike to Mr. *Morris*, but that was in the presence of her paramour, and there was no evidence that Mr. *Morris* disliked her; all the inferences of reason as well as of law, are, that at these interviews he availed himself of his marital privileges. He did not know that the wife was living in adultery, if he had he would not have allowed the daughter to live with her. It would be absurd to expect direct proof of sexual intercourse, but the law will presume it between husband and wife, if they have the opportunity, and the *onus* lies on the Respondents, who deny it, to prove that it did not take place at the meetings between Mr. and Mrs. *Morris*.

The admission of the Appellant's illegitimacy in the history of his birth, collected by him and read at the trials, is not evidence of his *status*; and it seems

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extraordinary that the noble Lord should, in his judgment, have given any weight to it.—[Lord *Lyndhurst*: All that is contained in the memorandum is proved by witnesses; it is not the Appellant's testimony against himself.]—He could not himself have any knowledge on the subject, and what he wrote down in the pocket-book, he collected from conversations with persons, who, being aware of the separation, and of Mrs. *Morris*'s adultery with *Austin*, supposed that the child was *Austin*'s. The decree was, in a great measure, founded on the admitted adultery of Mrs. *Morris* with *Austin*, and their concealment of the birth of the child from Mr. *Morris*. The wife's adultery does not repel the presumption of law, if the husband had access to her, as it is proved he had. It is difficult to comprehend the mother's motives for concealing the birth of the child, and afterwards denying its existence. It might be that, as she was separated from her husband, and *Austin* was living with her, she feared her neighbours, if they knew she had a child, would conclude that *Austin* was the father; or that she really believed the child was not her husband's, and she did not wish to deprive the daughter of "her birthright," as one of the witnesses said; or, lastly, that she feared to excite *Austin*'s jealousy by admitting that she had intercourse with her husband. She was a very extraordinary woman, and her concealment of the child, and her false denial that she had had such a child, are not grounds for holding him to be illegitimate. Her declaration was false, and her act is incomprehensible. No more weight ought to be given to one than the other. The judgment of the Lord Chancellor appeared to be founded on a mere balance of probabilities.—[Lord *Lyndhurst*: Every judgment is

founded on presumptions and inferences and on a balance, but not a mere balance, of probabilities.]—In all cases, judgments are founded on certain conclusions of law from facts proved or admitted. No conclusion, one way or the other, ought to be drawn from the supposed likeness of the Appellant to *Austin*. It is not necessary to show that *Austin* was not, but that the husband might be, the father.

The reasons subjoined to the Appellant's printed case do not go to the extent of the argument; they were signed without due consideration of the answers given by the Judges to the questions proposed to them by this House in the *Banbury* Peerage case. (o) Those

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(o) The following are the answers referred to. They are almost *verbatim* in the terms of the questions. They were agreed to by all the Judges, and delivered to the House on their behalf by Sir *James Mansfield*, then Lord Chief Justice of the Court of Common Pleas. The fourth and fifth formed part of the reasons subjoined to the Appellant's case.

" 1st. That the presumption of legitimacy, arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other during the period in which a child could be begotten and born in the course of nature, may be rebutted by circumstances inducing a contrary presumption.

" 2d. That the fact of the birth of a child from a woman united to a man by lawful wedlock, is generally, by the law of England, *prima facie* evidence that such child is legitimate. That in every case in which there is *prima facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question. That such *prima facie* evidence of legitimacy may always be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and the wife, as, by the laws of nature, is necessary, in order for the man to be, in fact, the father of the child. That the physical fact of impotency, or of non-access, or of non-generating access (as the case may be) may always be lawfully proved by means of such legal evidence as is strictly admissible in every other case, in which it is necessary, by the law of England, that a physical fact be proved.

" 3d. That after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the

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resolutions of the Judges, although of very high authority, are not binding on the House ; they are quite consistent with the Appellant's case, but it is necessary to see whether, as far as they are applicable to this case, they are conformable with law, and for that purpose it is necessary to advert to the law on this subject, prior to the decision of the *Banbury*

father of a child (by which we understand proof of sexual intercourse between them), no evidence can be received, except it tend to falsify the proof that such intercourse had taken place.

That such proof must be regulated by the same principles as are applicable to the establishment of any other fact.

" 4th. That in every case, where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place, at any time when, by such intercourse, the husband could, according to the laws of nature, be the father of such child.

" 5th. That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and the wife, at any time when, by such intercourse, the husband could, by the laws of nature, be the father of such child. Where the legitimacy of a child, in such a case, is disputed on the ground that the husband was not the father of such child, the question to be left to the jury is, whether the husband was the father to such child? and the evidence to prove that he was not the father, must be of such facts and circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife at any time when, by such intercourse, the husband could, by the laws of nature, be the father of such child.

" The non-existence of sexual intercourse is generally expressed by the words " non-access of the husband to the wife," and we understand those expressions as applied to the present question, as meaning the same thing, because in one sense of the word 'access,' the husband may be said to have access to his wife as being in the same place or the same house; and yet under such circumstances as, instead of proving, tend to disprove that any sexual intercourse took place between them."—See 1 Sim. & Stu. 153; *Le Marchant's Gardner* case, Appendix, 433; and Sir H. Nicolas' *Treat.* 181.

Peerage case. The whole of that law, and the cases illustrating it, are collected in Mr. *Le Marchant's* report of the *Gardner* Peerage case, and in Sir *Harris Nicolas's* Treatise on *Adulterine Bastardy*. The earliest case on the question of legitimacy, that is reported, is *Foxcroft's* case, (*p*) 10 Edw. 1. It was cited in the *Banbury* Peerage case, as an authority, that the legal presumption of the legitimacy of a wife's child might always be rebutted by evidence tending to show that the husband was not the father, without proof of his impotency, or absence from the realm at the time of the wife's conception. But it appears that the question in that case was not whether the husband begot the child or not, but whether the child was born in lawful wedlock (*q*), and the marriage was found to be invalid. That case, therefore, was not an authority for the position for which it was cited. In *Donne and Egerton v. Hinton and Starkey* (*r*), 14 Jac. 1, it was held by the then Lord Chancellor and the Chief Justices of the Courts of King's Bench and Common Pleas, that "if a married woman has issue in adultery, still if the husband be capable of begetting issue, and is within the four seas, it is not a bastard." And that was the law, as appears from the numerous cases collected by Sir *H. Nicolas* (*s*) from the reign of Edw. 1. to Car. 1. The principle of *intra quatuor maria* continued to be then in full operation. In *Thecar's* case (*t*), 4 Car. 1, a woman was delivered of a child 282 days after the death of *Thecar*, her husband; six days after his death she had married *Duncomb*, with whom she had cohabited for six months before. On a question

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(*p*) 1 Roll. Ab. 359.
 (*q*) Sir H. Nicolas Treat. 30
 and 557.

(*r*) 1 Roll. Ab. 358.
 (*s*) P. 30 to 71.
 (*t*) Sir H. Nicolas, 74.

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whether the child was *Thecar's* or *Duncomb's*, it was alleged, but not proved, that, though *Thecar* had been within the four seas, he was not capable of procreation for six months before his death, but it was adjudged that no averment could be received that *Thecar* did not cohabit with his wife so as to be the father of the child. And Lord Coke, in his First Institute, written about that time, says, "By the common law, if the husband be within the four seas, if the wife hath issue, no proof is to be admitted to prove the child a bastard unless the husband hath an apparent impossibility of procreation (*u*)."^a In Viscount *Purbeck's* case, all the circumstances of which are collected in Sir *H. Nicolas's* book, p. 90, Sir *William Jones*, Attorney-General is there (p. 114), and also in *Le Marchant's* Gardner Peerage case, pp. 421, 422, reported to have said, "Without question the wife's son is the husband's son, if the husband were *intra quatuor maria*;" and Lord *Nottingham*, then Lord Chancellor, said, "It is admitted that the father is legally the son of the grandfather, if he can prove himself the son of the grandmother. The grandchild, after fifty or sixty years elapsed, is put to prove, not that his father was lawfully begotten, (every one sees the danger of that,) but, which is all one in consequence, that his father was begotten of his grandmother. This ought not to be endured, for *filiatio non potest probari, nec debet* (*x*)."^b

There are several cases on settlements of paupers bearing on this subject. In *Rex v. Albertson* (*y*), it was held that a child begotten and born of a *feme covert*, while her husband was beyond the four seas, is a bastard. But if the husband was not *ultra mare*,

(*u*) First Inst. 244^a; see also 123^b, and the notes, and 373^a.

(*x*) Sir H. Nicolas, 116-7.

(*y*) 1 Ld. Raym. 123; S. C. 2 Salk. 483.

during the *whole* time of his wife's going with child, the child was held legitimate: *Regina v. Murray* (z). In *St. George v. St. Margaret* (a), it was laid down that "a child begotten after divorce *a mensa et thoro*, was bastard, for due obedience to the sentence was to be presumed, unless the contrary were shown. But if *baron and feme*, without sentence, parted and lived separate, the children begotten during that separation should be held legitimate, until the contrary was proved, for in such case access was to be presumed; but if a special verdict should find that there was no access, then the children were bastards; and so was the opinion of Lord *Hale*, in the case of *Dickens v. Collins*." Of this last case there is no report, except what is found in the reference to it by the Judges in the Appendix to Mr. *Le Marchant's Gardner* Peerage case, and in Sir *H. Nicolas'* book, under the title of *Hospell v. Collins*. In *St. Andrew v. St. Bride* (b), the wife's children were declared to be bastards, because non-access by the husband was found as a fact; and in *Pendrel v. Pendrel* (c), an issue from Chancery, the Court and counsel agreed that the old doctrine of the husband being within the four seas was not to take place, but the jury were left to consider the point of access, and, no access being proved, the jury found against the legitimacy of the party. In that case, also, the defendant was allowed to prove that the mother of the party was a woman of ill fame, but her declarations were not allowed in evidence to bastardize the child.

In a subsequent case, *Lomax v. Holmeden* (d), evidence having been given of the husband's being fre-

(z) 1 Salk. 122.

(c) Strange, 925.

(a) Id. 123.

(b) Strange 51, and Le Marchant's Appx. 357.

(d) Id. 940.

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quently in London, where the wife resided, access was presumed; and then to rebut the presumption of the child's legitimacy, evidence was admitted of the husband's inability to beget a child, by reason of a bad habit of body; but that evidence, amounting only to an improbability, was not sufficient. In the case of *Goodright v. Saul* (e), it was held for the first time, that the child of a married woman, begotten and born while her husband was within the country, may be proved a bastard by other evidence than that of the husband's non-access. That was a decision, granting a new trial, by the same Judge who, on the first trial, ruled that, in order to hold a child illegitimate, the husband being within the realm, proof of non-access was indispensable. In *The King v. Luffe* (f), it was held that non-access of the husband during the whole period of the wife's pregnancy need not be proved; it was enough if the whole circumstances of the case showed a natural impossibility that the husband could be the father. There was a case, *Boughton v. Boughton*, decided in 1807, not reported, but referred to by Lord *Erskine* in the *Banbury* Peerage case, in which *probability* of non-access was not admitted by Lord *Ellenborough* to have any effect; nothing short of *impossibility* of access of husband was admitted to show that sexual intercourse did not take place between him and his wife, so as that he could not be the father of her child. And in a case of *Smyth v. Chamberlayne*, which occurred about the same time in the Ecclesiastical Court, and is reported by Mr. *Le Marchant* in the Appendix to the *Gardner* Peerage case, it was laid down by Sir *W. Wynne*, that if you prove opportunity of access between husband

(e) 4 T. Rep. 356.

(f) 8 East, 193.

and wife at such time as would correspond with the birth of her child, that child must be legitimate. That doctrine agrees with what Lord *Ellenborough* and the other Judges of the Court of King's Bench said in the *King v. Luffe*. The case of the *Banbury* Peerage claim followed next in order of time.

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The resolution of the Judges, in answer to the third question, may have some application to this case. There is here proof of access between the husband and wife—implying generating access. There was no such proof in the case of Lord *Banbury*. The subsequent case of *Routledge v. Carruthers* (*g*) in this House is similar, in many of its circumstances, to this case. The husband having cohabited with his wife for ten years without having any child by her, left her in the beginning of August 1740, and she was not then with child. He returned after some months, when he found her with child, and brought an action of divorce against her: she was delivered of a daughter on the 28th of May 1741. The decree in the suit for divorce was not pronounced for six months afterwards. The Judges in Scotland held that the daughter was the legitimate child of the husband, and that decision was affirmed in this House (*h*). [Lord *Brougham*: It appears from Mr. *Dow*'s report, that the husband and wife were cohabiting at a time corresponding with the birth of the child in the ordinary course, August 1740, the child being born in May 1741]. The arguments of the Scotch Judges, and also of Lord *Eldon* in this House, would go to establish the child's legitimacy, even if a longer time had elapsed from the husband's departure till

(*g*) 4 Dow. 392.

(*h*) Id. p. 403.

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the birth of the child. The next case is *Head v. Head* (i), which is still more like this case than *Routledge v. Carruthers*, both in facts and in law. It is there decided, that where opportunity of personal access between husband and wife is established (as it is in the case now before the House), sexual intercourse is to be presumed, and the presumption must stand until rebutted by clear and satisfactory evidence. The facts stated in the report of the case of *Clarke v. Maynard* (k) were too scanty for drawing any conclusion from the judgment. The next case is *Bury v. Philpott* (l), in which it is held that where there is an opportunity of sexual intercourse between husband and wife at a time which would correspond with the birth of an after-born child, even though the wife is living in adultery, the Court will declare the legitimacy of the child. The last case on this subject is *Cope v. Cope* (m), which, in many of its circumstances, resembles the present case. That part of the learned Judge's observations to the jury, referring to the judgment now under appeal, ought not for that reason to be held entitled to any weight. The wife in that case had been living in adultery, the child was concealed from the husband, and was baptized as illegitimate; but it was not on those grounds that the case was put to the jury, or that they found a verdict against the legitimacy of the party, but because it was shown that the husband could not have had sexual intercourse with the mother. *Cope v. Cope* therefore follows the current of cases in which it was held, that where a husband has had an opportunity

(i) 1 Sim. & Stu. 150; and
 Turn. & R. 138.
 (k) 6 Madd. 344.

(l) 2 Myl. & K. 349.
 (m) 1 Moo. & Rob. 269.

of access to his wife at a period which admits of his having begotten the child born of her, he is presumed to have done so. The opportunity of sexual intercourse between the mother of the Appellant and her husband were in this case so clearly proved, as to raise, independently of the legal presumption, the strongest moral presumption that sexual intercourse did take place between them at the time when the husband, by such intercourse, could, by the law of nature, be the father of the Appellant; and under such circumstances, to allow the fact of the mother having lived at the time in a state of adultery with another person, and of her having concealed the birth of the Appellant from her husband, and of the adulterer having recognised the Appellant as his child, which were the facts on which the Respondents mainly relied, to have the effect of proof, that no such sexual intercourse did take place between the mother of the Appellant and her husband, or to enter into any balance of probabilities as to whether the husband or the adulterer was the father of the Appellant, would be contrary to the acknowledged principles of law, and would lead to the most inconvenient and dangerous consequences.

The *Attorney-General* and Mr. *Temple*, for the Respondents:—The first matter to be inquired into is the law on this subject; and the second is, whether that law is applicable to the facts of this case? If the question had been left on the reason annexed to the Appellant's case, taken from the resolution in the *Banbury* Peerage case, there would be no difficulty in coming to a decision; but the Appellant's counsel have, at the bar, withdrawn that reason, and now say, that if there was a physical possibility of sexual inter-

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course between the husband and wife within such time as that the Appellant could be the offspring of that intercourse, your Lordships must presume his legitimacy. Admitting that there was a possibility of sexual intercourse, we submit that the presumption that such intercourse took place may be repelled by evidence of facts, which induce a contrary presumption ; such as the continued separation of the husband and wife, her uninterrupted adultery with a paramour in her house, their concealment of the child, the adulterer's taking him away to the house of his own parents, baptizing him as base-born, and treating him as his own child, and by his will leaving him all the property he had, away from his own father and mother, who were in distress. Were all these proved or admitted facts to be put out of consideration on the decision of this case? Lord and Lady *Banbury* lived in the same house for several years, during which one or both of her children were begotten ; yet the presumption of sexual intercourse between them was rebutted by a series of facts ; not because he was eighty years of age, for many persons of that and greater age have been deemed capable of procreation ; not because there was not a possibility of access, but for the various cogent reasons stated at large in the speeches delivered in this House in the case by Lords *Redesdale*, *Ellenborough*, and *Eldon*, whose arguments it would be presumptuous in us to try to support. There was not one case among the whole series stated in Sir *Harris Nicholas's* book, from *Foxcroft's*, in the time of Edward 1, to *Bury v. Philippott*, in the year 1834, that did not support the *Banbury* Peerage case. *Cope v. Cope*, the last case of all, and not in that book, was decided on the same principle. The *Banbury* case was never doubted until some slight was cast on it by the learned Judges *Vaughan* and

Gaselee, on the trials of this case, putting it to the jury whether there were opportunities of sexual intercourse. All the cases decided in the courts, either at equity or at law, since the *Banbury* Peerage case, were decided in conformity with that case, as *Routledge v. Carruthers*, in Scotland, and in this House; *Head v. Head*, before the Vice-Chancellor, and on appeal before the Lord Chancellor; *Bury v. Philpott*, *Clarke v. Maynard*, and *Cope v. Cope*; and from Sir *H. Nicolas's* view of them this Appellant can draw no aid. The likeness of the Appellant to *Austin* was a feature peculiar to this case, and upon that point the most acute judges have founded powerful arguments. In *Day v. Day (p)*, Mr. Justice *Heath* said that Lord *Mansfield* thought that a family likeness was a material proof that a child was the genuine offspring of the parents from whom he claimed, referring to the following observations of Lord *Mansfield* in the *Douglas* cause in this House: "I have always considered likeness as an argument of a child's being the son of a parent, and the rather as the distinction is more discernible in the human species than other animals; a man may survey 10,000 people before he sees two faces perfectly alike; and in an army of 100,000 men, every one may be known from another. If there should be a likeness of feature there may be discriminancy of voice, a difference in the gesture, the smile, and various other characters, whereas a family likeness runs generally through all these; for in everything there is a resemblance, as of features, size, attitude, and action."

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The *Lord Chancellor*:—My Lords, in this case there are two questions, very different certainly in

(p) Sir H. Nicolas' Treat. 140 n.

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their nature, and leading to very different consequences, according to the opinion your Lordships may form upon them : the one affecting the interests of the parties, and the other a legal question of greater importance in point of law. My Lords, I understood the argument of the Appellant, (but it is a question which probably your Lordships will take time to consider before you come to a final decision upon it,) to be, that, under the circumstances which are admitted on both sides to have passed between the husband and the wife at the time when the child was begotten, it is not lawful to look at the subsequent conduct of the parties, in order to repel the presumption which those circumstances raise of sexual intercourse having taken place ; and it is contended that that point is not decided in the *Banbury* Peerage case, and that it is contrary to the principle of all the cases on the subject. My Lords, a question of so much importance undoubtedly requires an investigation of the authorities which have been brought before you, before your Lordships come to a final decision upon it : and it is the more necessary to take time before your Lordships come to a final decision upon it, because, from the discussion at the bar, it is obvious that the use of one particular word may lead to doubt in future cases. The other question is a question immediately affecting the interests of the parties, but not one of any general importance in point of principle, namely, (if your Lordships be of opinion that you are at liberty to look to the subsequent conduct of the parties, in order to rebut what the counsel for the Appellant contend to be the irresistible conclusion of law,) whether the circumstances in evidence are sufficient to counterbalance that legal presumption, and to lead your Lordships to a conclu-

sion inconsistent with that which would otherwise be the conclusion of law. That also requires investigation of the evidence, and if your Lordships think that Tuesday next will allow sufficient time to inquire into those points, I think your Lordships will be in a situation that day to dispose of this case.

[Adjourned accordingly.]

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The *Lord Chancellor*:—My Lords, the case to which I am about to call your Lordships' attention, has naturally excited great interest from the length of litigation which has attended it, and from the various results which have followed the trials which have been directed to take place. It also has assumed considerable importance from the propositions which have been argued at your Lordships' bar, involving questions which affect the community at large on a subject most interesting to the various questions that may arise in the distribution of property.

Dec. 12.

My Lords, it is obviously necessary to consider this case in many points of view totally distinct from one another; and one question is with respect to the way in which the law is to apply to the facts of the case. Having ascertained what the rule of law ought to be, the next question is how far the facts bring the case within that rule of law.

My Lords, the Appellant's proposition of law is, that when there is evidence showing the husband and wife to have been in such a situation together as that sexual intercourse might have taken place, the presumption of law that it took place is not to be rebutted by circumstantial evidence, such as evidence of subsequent conduct. It is, however, admitted that

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such inference may be met, and, if the circumstances be strong enough, repelled by evidence diminishing the probability or showing the improbability that such intercourse did in fact take place upon the occasion, such as the shortness of the time the parties were together, the purpose for which they met, and the circumstances of the place in which they were; that is, by evidence not going directly to negative the fact of sexual intercourse, but by circumstantial evidence negating the presumption of such interviews having been used for the purpose of sexual intercourse, by raising from the facts proved a still stronger presumption that no sexual intercourse did in fact take place. But it is contended that such circumstantial evidence must be confined to the particular circumstances of such meetings.

Now the point in issue is, whether the husband and wife, on the occasions referred to, had sexual intercourse, that is, whether they committed a certain act, and it has not been explained why, if circumstantial evidence be received to prove or disprove the act of one party, such circumstantial evidence is to be confined to the particular period of the imputed act, and why the subsequent acts and conduct of the parties are not to be looked at and considered, for the purpose of establishing or repelling the presumption of the act in question having taken place.

If after the birth of a child whose legitimacy is questioned, the husband and wife had acknowledged the child as legitimate, such recognition would, beyond all doubt, be received as strong evidence of the legitimacy; but if so, evidence of their having repudiated the child as illegitimate must be receivable to disprove the legitimacy. The argument of the Appellant is put thus: If sexual intercourse be proved,

no evidence will be permitted to prove the child illegitimate, and proving the husband and wife to have been in situations in which sexual intercourse might have taken place, is proof of sexual intercourse. And as no distinct proof of actual sexual intercourse is required or capable of being given, therefore no evidence can be received to prove the child illegitimate. This argument appears to me to rest entirely upon confounding two things, which are perfectly distinct, viz., the proof or conclusion of sexual intercourse having taken place, with the evidence by which such a conclusion is to be established. If sexual intercourse be proved, that is, if the jury or the Judge trying the question of fact be satisfied that sexual intercourse took place between the husband and wife at the time of the child being conceived, the law will not permit an inquiry whether the husband or some other man was more likely to be the father of the child; and some facts are so strong as to afford irresistible evidence of sexual intercourse having taken place, such as the husband and wife sleeping together, there being no natural impediment to sexual intercourse; but in the absence of such irresistible evidence, the fact of sexual intercourse must be tried like every other fact to which no direct evidence is applicable. Proof that the husband and wife were living in the same town, and so had opportunities of meeting, and therefore of sexual intercourse, would, in the absence of any proof raising a presumption to the contrary, be sufficient to establish the legitimacy of a child born of the wife. Proof that they had been in the same room or in the same house together, would be much stronger evidence of the fact, the strength of which, however, would vary with the circumstances; and as neither would be direct proof of sexual intercourse,

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but of facts from which, taken by themselves, sexual intercourse would be inferred, such inference must, as in all other cases, be capable of being repelled by the proof of facts tending to raise a contrary inference.

The argument for the appellant assumes as a rule of law, that no evidence is admissible to disprove sexual intercourse having taken place, where the opportunity is proved to have existed, the husband and wife being proved to have been within the same house. This is very like attempting to establish a doctrine of *intra quatuor muros*, instead of the exploded doctrine of *quatuor maria*. But it is admitted that the parties may be followed within these four walls, and the fact of sexual intercourse not only disproved by direct testimony, but by circumstantial evidence raising a strong presumption against the fact. If so, the principle does not stand on any positive rule of law, but upon evidence of the fact as to which the ordinary rules of evidence must be applied.

Such would appear to be the obvious and common sense state of the question, as the law is now understood, and such appears to be the result of all the authorities since the *Banbury* Peerage case; for, although some Judges since that time have used expressions not quite reconcileable with the true principles of that case, and of the opinions of the Judges given upon it, I do not find that any Judge has ever expressed any opinion that the law had not been correctly laid down in that case, or manifested any intention of acting on any principle inconsistent with the doctrine there propounded. Approving as I do of that doctrine, and feeling strongly the great evil that would arise from questioning rules so solemnly propounded, and which have now for many years been considered as

The doctrines laid down in the *Banbury* Peerage case, examined and approved of, and held applicable to this case.

the established and acknowledged law upon the subject, I shall confine my inquiries to the principles laid down in that case, and acted upon in subsequent cases.

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My Lords, it is very material before I observe upon the particular doctrine as found in the opinions of the Judges, and laid down by the Noble Lords who gave their opinions in the *Banbury* Peerage case, that I should call your Lordships' attention to the position in which the facts of that case stood. I lay entirely out of the question all the evidence given by witnesses who were not believed, and on whose evidence therefore this House did not proceed, proving undoubtedly, if believed, not only that Lord and Lady *Banbury* were living together without any separation in fact or law, but that they were actually in the habit of sleeping together. Those witnesses were not believed, and your Lordships may assume, that the judgment of this House was not at all affected by what was deposed to by those witnesses. Some facts, however, were in evidence, which were beyond all doubt established, because they rested on records and evidence, with respect to the authority of which no doubt existed. There being two children, one born in 1627, and the other born in *January* 1630—corresponding with *January* 1631, according to the present calculation of time,—evidence was given of a deed executed in the year 1629, in which Lord *Banbury* makes a provision for his wife, describing Lady *Banbury* as “his good and loving wife”; and in the year 1630, he gave the residue of his property to his wife, and appointed her his sole executrix. Perhaps not very much is to be inferred from these two documents, for the recital in a deed, and the provision in a will, are not so inconsistent with the fact of the husband and wife living in a state which would

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negative the husband being the father of the child, as to countervail that fact. But what I wish to call your Lordships' attention to is, the absence of all proof to the contrary. There was the fact of a husband and wife, as to whom there was no proof of any thing to the contrary of their living together as such—as far as the evidence went the proof was the other way; there was that dealing with regard to the property, and the provision in the will, from which it would be inferred, without evidence to the contrary, that they were living together in the ordinary situation of husband and wife, and then the law would assume,—there being no evidence to shake it,—the necessary conclusion of law.

My Lords, in addition to these facts, it appears that on three several occasions of fines being levied in *January* 1630, *November* 1631, and *June* 1632, they appeared together in public for the purpose of levying those fines. In addressing the House as to the facts, the Noble Lords who had to decide the *Banbury* Peerage, had to deal with a case in which there was no evidence raising any presumption—so far at least as the evidence to which I have alluded goes—not only no evidence of separation, but no evidence from which it could be inferred that there was any thing in the relative situation of Lord and Lady *Banbury* different from the ordinary situation of husband and wife. On the other hand, however, there were facts which this House considered as raising a presumption so irresistible that the child born was not the child of Lord *Banbury*, that they came to the resolution that they were not only justified, but bound to report to the Crown that the child in question was not the child of Lord *Banbury*; there were circumstances arising from the conduct of the parties, and

the mode in which the child had been treated, and various other circumstances, which it is not now necessary to detail; for we are not now considering whether the conclusion to which the House came in the *Banbury* Peerage case was correct or not, but what were the principles upon which the House proceeded in that case. Sir *Samuel Romilly*, who was then the advocate at the bar in favour of the claim, did not put the rule of law in the way in which it has been put on behalf of the Appellant in the present case. Sir *Samuel Romilly*, after stating how the facts of the case stood, did not contend that the evidence could not be met by circumstantial evidence; but he used the expressions, "If the reputation had existed that *Nicolas* was not the son of Lord *Banbury*, the law officers of the Crown were bound to have brought it forward; they ought to have proved such reputation (*q*)."
 Lord *Erskine*, who took the strongest part in favour of the claimant in 1811, moved that the claim might be admitted. Upon his motion Lord *Ellenborough* expressed himself thus: "There is no doubt that the presumption of the legitimacy of a child, the husband and wife having access, may be rebutted." Now it is very true, that in all these cases much confusion arises from the various senses in which the word "access" is used. It is quite clear that Lord *Ellenborough* there did not mean to use the word "access" in the sense of sexual intercourse, but access affording opportunities of communicating together, opportunities of sexual intercourse, but not actual sexual intercourse; because it is not disputed that the fact of sexual intercourse being established, no question could be raised as to the legitimacy of a child

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(*q*) *Le Marchant's Gardner* case, App. 425, and Sir H. Nicholas' Treat. 449.

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born within the proper time. Lord *Redesdale* says, "The presumption of the birth of a child in wedlock may be rebutted both by direct and presumptive evidence; first, by direct, as impotency and non-access, that is, impossibility of access; secondly, by all those circumstances which may have the effect of raising a presumption that the child is not the issue of the husband."

My Lords, nothing was done upon that motion of Lord *Erskine* in 1811. In the year 1813, the motion was again made, and my Lord *Redesdale* then expressed himself thus: "In the case of a husband and wife living in such habits of intercourse as that the husband may be the father of the child, as the fact that the child is the child of A, is only presumption; it may be rebutted by circumstances, and the conclusion must be drawn from all the circumstances taken together." On the same occasion Lord *Ellenborough* thus expressed himself: "The presumption in favour of legitimacy is sometimes strong, often weak, but being only presumption, and not a rule of law, it is liable to be repelled by circumstances leading to a contrary presumption, &c. Physical impossibility would be conclusive. Why is moral impossibility to be rejected?" Lord *Erskine* upon the same occasion said, "The presumption of the legitimacy of a child, born in wedlock, can only be repelled by proof of the impossibility of the husband being the father, and this impossibility must arise from physical inability, or non-access." Undoubtedly, if by non-access, Lord *Erskine* meant non-sexual intercourse, he does not lay down, in that passage at least, any rule from which any conclusion can be drawn, for that would be consistent with the opinions of all the learned Judges and Lords who have expressed their opinions. But if by

non-access, he meant no opportunities of access, he undoubtedly differs from the other learned Lords. He says, indeed, that the presumption of sexual intercourse cannot yield to evidence of its being improbable. That *dictum* undoubtedly raises a proposition which is not supported by the other opinions. But he immediately afterwards says, "incompetency is only presumption;" so that you are to go into evidence to render the fact of sexual intercourse more or less credible, incompetency not being capable of positive and direct proof. He says, the fact of incompetency is only presumption, arising from medical opinions and other causes; therefore, according to his own opinion, evidence is to be let in, as to the fact of competency or incompetency, to raise a presumption, according to the weight given to such evidence, that the child was the child of the husband and wife, negating the presumption arising from medical evidence of the incompetency, which can hardly ever amount to impossibility, at least not to direct proof of the impossibility of the husband being the father of that child. On that occasion, Lord *Eldon* states, that he approves of Lord *Hale's* doctrine in *Hospell v. Collins*, that the issue for the jury was as to the fact of access, that is, sexual intercourse, and not access of another sort, which only affords a ground for inferring sexual intercourse, which may be rebutted by evidence. He then says, "The question is, whether Lord and Lady *Banbury* had sexual intercourse at such time as that, in the course of nature, *Nicholas Knollys* could have been the fruit of that intercourse. Of this there can be no direct evidence. Circumstantial evidence must therefore be received, and amongst other evidence, that of the conduct of the supposed parents (*r*)."

(*r*) These passages, cited by the Lord Chancellor from the

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My Lords, in his protest against the judgment of the House, Lord *Erskine* did not dispute the opinions given by the Judges upon the first and second questions; and he assumed the fact, that Lord and Lady *Banbury* were living together; he admitted that concealment was admissible against the primary presumption of access, but not against the fact of actual access.

Now, my Lords, the result of the opinions and the grounds upon which the House proceeded in the *Banbury* Peerage case, appear to me to be left in no manner of doubt. There were facts, which undoubtedly, if taken by themselves, would have been proof of the legitimacy of the child; there was the marriage, the absence of all proof of impotency from the age of the Earl; the age might make it more or less probable, but there was no evidence to show that he was of that age which rendered it impossible that he should be the father of the child. There was no natural impediment proved; there was the absence of all evidence of the parties living together otherwise than as husband and wife ordinarily live together. But then the question was, whether the husband and wife had sexual intercourse, so as to make it possible for the husband to be the father of the child. The circumstances of the conduct and history of the transaction, the facts which attended the birth of the child, the mode in which the child was recognised by the one party, and never brought to the knowledge of the other; the conduct of those who alone could have knowledge of the fact, whether the husband was the father of the child or not, were all

speeches of Lords *Erskine*, *Redesdale*, *Ellenborough*, and *Eldon*, in the *Banbury* Peerage case, are not in the exact words of the reports of Mr. Le Marchant and Sir H. Nicolas, but they are to the same import and effect where the words are not the same.

considered so strong, as in that case to repel the legal presumption of the child born in wedlock of the wife being the child of the husband. I think when your Lordships come to consider the facts of this case, you will not hesitate to say, that that was the legitimate inference to be drawn from the facts in the *Banbury* Peerage case. There can be no question whatever of the inference to be drawn from the facts in this case. The opinions of the Judges, if they did not apply directly to the facts of this case, would of course be of infinite value as the unanimous opinions of the Judges of England; undoubtedly they derive much greater weight as being submitted to this House, and so fitted in with the facts of the case as to be adopted by the House and made the ground of its decision. The Judges in the answer to the first question, say,—I give this as the result of the opinion they delivered,—First, that when husband and wife having opportunities of access, the presumption of legitimacy may be rebutted by circumstances inducing a contrary presumption. Secondly, that non-access, or non-generating access, may be proved by means of such legal evidence as is admissible in every other case in which it is necessary to prove a physical fact. Thirdly, that after proof of sexual intercourse evidence will not be admitted except to disprove the fact. Fourthly, that sexual intercourse is presumed, unless met by such evidence as satisfies those, who are to decide, that it did not take place. Then in terms they state, that by access they mean sexual intercourse, and not such intercourse as is understood by being in the same place or in the same house. Now, my Lords, all these answers assume, that if sexual intercourse be proved at the proper time, the legitimacy of the child cannot be questioned, and that the fact of sexual intercourse may be tried like any other fact.

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They do not assume that opportunities of sexual intercourse are conclusive evidence that it did take place.

My Lords, I consider the *Banbury* Peerage case as establishing a principle, not only from the opinions of the Judges, but from the points actually decided, distinctly negating the presumption argued for at the bar,—namely, that where the evidence proves that the husband and wife had opportunities of access, from being shown to have been in the same house or place, no evidence from the conduct of the parties, that is, no circumstantial evidence, can be received to repel the presumption of sexual intercourse, and therefore of the legitimacy of the child—because, first, in that case, there was no evidence of any separation or quarrel between Lord and Lady *Banbury*, and the presumption of their living together as man and wife, and of a sexual intercourse therefore arose, but yet was capable of being repelled by circumstantial evidence; secondly, because, independently of the witnesses whose testimony was discredited, there was evidence direct of their being on terms at least of friendship, from the acts to which they were both parties, and from the fines, when they appeared together in public. It must therefore have been assumed, that Lord and Lady *Banbury* were living together as much as if the direct evidence of their being in the same house was credited. But the presumption of sexual intercourse thence arising, was rebutted by the conduct of the parties and other circumstantial evidence. It does not appear to me that there is any difficulty in extracting the rule of law, either from the decision of the case or from the opinions of the Judges; and the rule of law so to be extracted appears to me to be utterly inconsistent with the position upon which in point of law the case of this Appellant is rested.

But it has been supposed, that subsequent cases have not proceeded upon the rule so to be extracted from the *Banbury* Peerage case, and *Head v. Head* (s) is cited for that purpose. Now the facts of that case do not bear upon the question, because there were no facts to rebut the presumption of legitimacy arising from the interviews and opportunities of sexual intercourse proved to have existed. But Sir *John Leach*, in terms, recognises the doctrine of the *Banbury* Peerage case, and says, that where the husband and wife are proved to have been together, sexual intercourse will be presumed, unless disproved by evidence of circumstances affording irresistible presumption that it could not have taken place; not direct proof negating the fact, but evidence of circumstances affording a presumption against it, by which must be understood moral conviction that it had not taken place.

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In Lord *Eldon's* observations upon the *Banbury* Peerage case, in the case of *Head v. Head*, he correctly states the opinions of the Judges upon the point in question, and expresses no disapprobation of them; but he certainly seems to have supposed that the decision did not turn upon that point. He evidently, however, on that occasion, had not referred to the case which had been decided ten years before.

My Lords, in the *Gardner* Peerage case, in 1824, there were two points upon which the illegitimacy might have been established. First, on the medical evidence, that the time of imputed gestation was so long as to render it impossible for the husband to have been the father of the child; but in order to decide upon this ground it was necessary, first, to come to a conclusion in favour of that proposition against the very strong medical testimony on the other

(s) 1 Sim. & Stu. 150; Turn. & R. 138.

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side. The second point was, that though there might be a possibility of the husband being the father, upon the question of time, there was sufficient circumstantial evidence, of which the length of time no doubt formed a part, to lead to the conclusion that he was not, and it is clear that the House decided on the latter ground; for Lord *Eldon* declined entering into the discussion of the *ultimum tempus*, by which consideration alone the physical impossibility could be proved, and proceeded upon all the evidence together, which satisfied his mind that the child was not the child of the husband.

In *Bury v. Philpott* (t) there was no evidence to rebut the legal presumption of legitimacy except the adultery of the wife; but Sir *John Leach* recognised the rule that the presumption of sexual intercourse, arising from access affording opportunities, might be rebutted, which is precisely that which is controverted by the Appellant. Sir *John Leach* acted on the same principle, in *Clarke v. Maynard* (u), in 1822, access, in his judgment, in that case, being to be considered as meaning sexual intercourse.

Such are the whole of the decided cases which have occurred in this country upon this point, since the *Banbury* Peerage case. It is not, I think, material to inquire into the form in which the rule of law has been laid down at *nisi prius*, particularly in cases in which such form has been so often objected to as to have been the ground of a new trial being directed, because, as I do not find any instance in which any Judge has intended to lay down a rule different from that which is to be extracted from the *Banbury* Peerage case, any deviation from the correct expression of that rule, which may have occurred in directing

(t) 2 Myl. & Keen, 349.

(u) 6 Madd. & Geld. 364.

the jury, must be attributed to the circumstances attending a trial where the Judge probably had not the means of refreshing his memory as to the precise definition of the rule.

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I have before said that I have no intention of going through the cases which preceded the *Banbury* Peerage case, but I cannot but observe that the case of the *King v. Luffe* (x) is not, in my opinion, to be considered as so opposed to the principle of the *Banbury* Peerage case as has been supposed. If Lord *Ellenborough's* judgment in that case were subject to such a construction, it would weigh but little against the more maturely considered opinion of the same learned Judge at a period long subsequent. But it is to be recollected, that the *King v. Luffe* was a case of actual proved impossibility; and in this, as in all other cases, the language of the Judges must be construed with reference to the subject matter before the Court; and in that case, Mr. Justice *Le Blanc* refers to *Goodright v. Saul* (y), as establishing that there was no necessity to prove the impossibility of access if the other circumstances of the case went strongly to rebut the presumption of access.

If then your Lordships are at liberty to examine the facts of the case, and upon a careful consideration of all the evidence, to ask yourselves whether there is satisfactory proof that the child born of Mrs. *Morris* in *January* 1793 was not the child of her husband, I cannot think that your Lordships will have any difficulty in coming to that conclusion. The husband and wife had been living in different places, under articles of separation, ever since the year 1788. They had one child, a daughter. The wife lived in undisputed adultery with a person of the name of *Austin*. Early in *January* 1793 she was

(x) 8 East, 193.

(y) 4 T. Rep. 356.

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delivered of a child, whose birth was anxiously concealed, and it was taken the very night of its birth thirty miles to the father of this *Austin*, where it was reared. It was baptized as a base-born child. It was recognised by *Austin* as his child up to the time of his death, and when he died he left his property to the child, to the exclusion of his parents, who were in very distressed circumstances. Mrs. *Morris*, who always treated this child as her offspring, when charged by the husband with having had a child, positively denied the fact. That the husband was in absolute ignorance of the birth of the child till long afterwards is not in doubt, and when he did know or suspect it he repudiated the child as his, which is proved by his leaving his property to others at the time he had quarrelled with his daughter. These, then, are the unequivocal acts of the only three persons who could have what may be called knowledge of who was the father of the child, all concurring in this, that he was not the child of Mr. *Morris*. Can the conduct of any of the three be reconciled with the supposition that it was his child, or could possibly be his?

If Mrs. *Morris* had had connexion with her husband, so that he might be the father of the child, why should she have concealed the birth? Why deprive the child of its birthright, and incur the risk of being detected in having given birth to an illegitimate child? If Mr. *Morris* had had connexion with his wife, so that he might have been the father of the child, why should he reproach his wife with having had a child? And why repudiate a child of which he must have supposed himself to be the father? And why, if there had been any pretence for throwing the burden of the child upon Mr. *Morris*, did *Austin* take upon himself that charge, and throughout his life

recognise the child as his own, and leave it all his property at his death?

No evidence that could be given could shake the moral certainty arising from the acts of these three persons; but what are the facts given in evidence to repel the presumption arising from these acts, or rather, perhaps, to support the presumption of law in favour of the legitimacy of the issue of a married woman? First, it was attempted to be shown that the husband and wife had slept together about the time at which the child must have been begotten. This, at the first trial, was attempted to be proved by *Mary Evans*, who fixed the visit to Mrs. *Lloyd's* in 1792, and by *John Williams*, the coachman; but they so contradicted each other as to deprive both of all credit. The same witnesses were produced at the second trial; but *Mary Evans*, though proved to have been in court, was not examined on the third trial. Again, at the second trial *Ann Arthur* was examined, to prove that Mr. and Mrs. *Morris* passed a night together at *John Morris's* in 1792; and *Elizabeth Wel-ling's* was examined, to prove that Mr. *Morris* passed a night at Mrs. *Morris's* at *Llanfair*, about *Christmas* 1792; but neither of these witnesses, though proved to have been in Court, were examined at the last trial. The only other attempt to prove that Mr. and Mrs. *Morris* slept together about that time was by Mrs. *Lloyd*, but she only says that she knew nothing to the contrary of their having slept together, and she gives no date to the visit. *John Williams*, indeed, gave the date, the date of 1792, but he is contradicted by Mrs. *Lloyd*, as to the manner of their coming, and by *Mary Evans*; and *Margaret Jones*, who was Mrs. *Lloyd's* servant till 1796, says she never saw Mr. *Morris*; and *Mary Jones*, who was housemaid for eight years from 1796, says that Mr. and Mrs. *Morris* came over

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to Mrs. *Lloyd's*, but slept in separate rooms. It must be supposed that this was the visit of which Mrs. *Lloyd* speaks; that is the only way in which the testimony of the witnesses can be reconciled.

The attempt and the failure of the attempt to prove that Mr. and Mrs. *Morris* slept together, leaves on the mind an impression very different from what would have been the effect of a mere absence of all evidence upon that subject. But then evidence is brought to prove, that Mr. and Mrs. *Morris* were frequently in company together at *Llanfair* in the year 1792; some witnesses speaking to their being together in the house, and others in the fields and road; and the question, if the witnesses are believed, is, whether sexual intercourse is to be presumed to have taken place from the opportunities which such meetings afforded.

It appears to me that, independently of the presumption arising from the conduct of the parties, the evidence of these witnesses of itself disproves the proposition it is adduced to prove. To have been the father of the child, Mr. *Morris* must have had sexual intercourse with Mrs. *Morris* about the end of *March* 1792. The witnesses speak of their being seen together in the spring and in the autumn, and till near *Christmas* 1792, particularly *Evan Evans* and *Elizabeth Wellings*. If this intercourse took place in *March* or *April*, it must be supposed to have been repeated at those subsequent meetings; but it is clear that Mr. *Morris* had not till long afterwards any suspicion of Mrs. *Morris* having been pregnant; so that upon the supposition of the Appellant, Mr. *Morris* must not only not have seen the outward symptoms of pregnancy, which are proved to have been visible to every one else, but he must have been in the habit of sexual intercourse with his wife without discovering it. This,

to my mind, proves that but little credit is to be given to the evidence of these witnesses, and that it is absolutely certain that if these interviews did take place, they did not lead to sexual intercourse.

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My Lords, I think it quite unnecessary to go into any further detail of the evidence. The result is, I think, stated by the Noble and Learned Judge in the Court below (z) very distinctly, and certainly not too unfavourably to the case of the Appellant. I have no doubt that your Lordships are entitled to look into all the circumstances of the case, in order to satisfy your minds whether sexual intercourse did take place between Mr. and Mrs. *Morris*, at such time as might make it possible for him to have been the father of the child ; and I think it equally free from doubt, that the fair and irresistible result of such inquiries is the conviction that no such intercourse did take place, and that the child was not his. The appeal must, therefore, be dismissed ; but after the various conflicting verdicts which have been given upon this case, I think it should be dismissed, without costs.

Lord *Lyndhurst* :—My Lords, I attended very closely to the arguments of the learned counsel at the bar upon this appeal ; but I confess that those arguments did not lead me in any degree to alter the opinion I had formed upon the subject, when it was under my consideration in the Court of Chancery. As the judgment, which I then pronounced, has more than once been read at your Lordships' bar by the counsel for the Appellant, I feel that I should not be justified in entering into the details of this question, particularly after the very full and able exposition of it which has been made by my noble and learned friend

(z) Lord Lyndhurst.

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on the woolsack. I am desirous, however, of saying one or two words, or rather of making one or two observations, both as it respects the law, and as it regards the facts of the case.

The law was laid down by the learned Judges in the *Banbury* Peerage case in these terms: "That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse, the husband could, according to the law of nature, be the father of such child" (a). That was the proposition laid down by the learned Judges unanimously, in their answer to one of the questions put to them by your Lordships' House; and the proposition so stated by the learned Judges was afterwards enforced with great power by my Lord *Redesdale*, my Lord *Ellenborough*, and my Lord *Eldon*, as Chancellor of this kingdom,—three Noble Lords, of whom I may say, no more learned and distinguished individuals ever adorned the tribunals of this country. Lord *Eldon*, in particular, stated, in the course of his able argument, the proposition of law in these terms (b): "He decided (speaking of Lord *Hale*, in *Hospell v. Collins*) that the issue for the jury was, as to the fact of access, or, as I understand him to mean, sexual intercourse. For the access in question is of a peculiar nature, not being access in the ordinary acceptance of the word, but access between a husband and wife viewed with reference to its result, namely,

(a) *Vide ante*, p. 230, 4th answer. (b) Sir H. Nicolas' *Treat.* 521.

the procreation of the children. It is true that the proof of access of another sort is a ground for inferring sexual intercourse, but the inference," he says, "is only a highly probable and strong one. A jury (and your Lordships here perform the functions of a jury) ought to be told, that where the husband and wife have had the opportunity of sexual intercourse, a very strong presumption arises that it must have taken place, and that the child in question is its fruit, and your Lordships ought also to be told, that this is but a very strong presumption, and no more; that a strong presumption may be rebutted by evidence, and that it is the duty of a jury and your Lordships to weigh the evidence against the presumption, and to decide according as, in the exercise of free and honest judgment, either may appear to preponderate (c). It is necessary, however, to consider what evidence is admissible to rebut this presumption. This is a question of some nicety, and deserving of the utmost attention your Lordships can give to it." He then proceeds with his argument and says, "Evidence of the conduct of the supposed parents of the child appears to me to be admissible evidence upon this question." This is the manner then in which the law was stated, not only by the learned Judges who were summoned to attend your Lordships' House, but in which that law was also stated and enforced by the Noble and Learned Lords to whom I have referred.

Undoubtedly, my Lords, the learned counsel at the bar were entitled to do that which they did do, and with great ability, namely, endeavouring to impugn those propositions and those doctrines; but I doubt very much whether your Lordships will think, unless some cases in opposition to the opinion so expressed

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(c) See the note on this passage, Sir H. Nicolas, 522.

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could have been cited, that any observations of that kind would be attended with much effect.

My Lords, I stated upon the former occasions, and I still entertain that opinion, that the learned Judges laid down no new principle of law in the *Banbury* Peerage case. The moment the courts of justice decided against the absurd doctrine of *intra quatuor maria*, it appeared to follow as almost a necessary consequence, that no other rule could be established than that which is stated by the learned Judges in the case to which I have referred; and, my Lords, in the case of *Pendril v. Pendril*,—I refer to the judgment of the Court as reported in a note in Mr. Justice *Buller's Nisi Prius* (d),—and in the case of *Goodright v. Saul*, and in the other cases that were referred to by the Noble Lords in the course of the argument, it appears to me that the principle laid down by the learned Judges is clearly and distinctly involved.

My Lords, it was suggested at the bar, but I think not stated with much confidence, that the opinion of the learned Judges in the *Banbury* Peerage case had been overruled by subsequent decisions, or, at least, was at variance with subsequent decisions. I have looked through the different cases to which my noble and learned friend has adverted, and I find, looking at them minutely and attentively, that not one of them in the slightest degree breaks in upon the principle so laid down. I agree in that which is stated by my noble and learned friend, that particular expressions may be picked out from the opinions delivered by the Judges on different occasions, which expressions, taken without reference to the facts of the case to which they were intended to apply, may be made the foundation of plausible arguments for the pur-

(d) Bull. N. P. 113.

pose of impeaching the authority of the decision in the *Banbury* case; but they do not go at all further than that which I have suggested, and it is remarkable—and in that also I concur with the Noble and Learned Lord on the woolsack—that in no one of the various cases to which reference has been made, (I refer to the subsequent decisions,) has the principle laid down by the learned Judges in the *Banbury* case ever been called in question.

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Reference has been made to what was stated by Lord *Eldon* in the case of *Head v. Head*. Lord *Eldon* upon that occasion stated, and stated very correctly, that the opinions of the learned Judges, in answer to the questions put to them by your Lordships, do not amount to the authority of a judicial decision. Undoubtedly they do not. It is not a judicial decision,—it is an opinion given upon a hypothetical statement of facts, not upon the case precisely as it is in argument before your Lordships; but then that Noble and Learned Lord adds, and adds with great propriety, that an “opinion so expressed, and unanimously expressed, by all the learned Judges of *England*, must possess very great weight, and is entitled to the greatest consideration, although strictly and technically it cannot be considered as a judicial decision.” That was what was stated by the Noble and Learned Lord in the case of *Head v. Head*; he does not appear for a moment to entertain a doubt that the evidence of circumstances and the conduct of the parties might be made use of, for the purpose of rebutting and repelling the presumption. He does not at least state that it may not be made use of. Had he so stated, such statement would have been contrary to and directly at variance with that very opinion which I have just read, expressed by him in the course of the argument.

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in the *Banbury* Peerage case. But that the Noble and learned Lord did not so mean, is quite obvious from what took place in the following year, in the case which has been referred to by my noble and learned friend, the case of the *Gardner* Peerage. In that case, a considerable body of evidence of medical men was offered for the purpose of showing that it was impossible, according to the course of nature, that Captain *Gardner* could have been the father of the child, on account of the interval which had elapsed between his leaving *England* and the birth of that child. There was also much evidence with respect to the conduct of the parties. What was the course pursued by the noble and learned Judge when he came down to move the judgment in your Lordships' House? He rejected the whole of the medical evidence. He said he could form no satisfactory conclusion with respect to it, and he decided the case, and recommended to your Lordships to decide it, solely upon the conduct of the parties. He expressed himself, my Lords, in these terms: "Without entering into a discussion as to the *ultimum tempus pariendo*, he was perfectly satisfied upon the whole evidence that the case had been made out. It might no doubt," he said, "be expedient, *ex abundante cautela*, to dwell upon the circumstance of protracted gestation, but there was enough without it. The birth of the child was sedulously concealed from the husband. He was called by the name of the adulterer, who reared him, educated him, and finally provided for him," (these are facts which exist in this case,) "having moreover married Mrs. *Gardner* the instant the divorce was obtained. Surely, if the *Banbury* case be law, there is enough to bastardize the child without resorting to the other evidence, which forms

so large a portion of this case, and after all, what does it amount to?" It is quite clear, therefore, that that case was decided upon the advice of that Noble Lord, merely with reference to the conduct of the parties, and therefore that case, having been decided the year after the case of *Head v. Head*, shows that he never meant to express a doubt that evidence of circumstances and of the conduct of the parties might be made use of, for the purpose of repelling the inference of law arising from the relation of husband and wife.

My Lords, this then is the view I have always taken of the law connected with this subject; at the same time, as I before expressed, and I now feel, that presumption of law is not lightly to be repelled. It is not to be broken in upon, or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive. The question is, therefore, whether the facts of this case are sufficient to repel that presumption. My Lords, I have no intention of repeating the observations, which, in the Court below, I made upon the evidence as applicable to this case; they have been gone through in detail with great accuracy by my noble and learned friend; but I think I may venture to say, that all the circumstances which occurred in the *Banbury* Peerage case, and upon which reliance was placed, all the principal circumstances exist in this case, and with more distinctness and precision than the case of the *Banbury* Peerage. In the case of the *Banbury* Peerage the adultery was questioned by the learned counsel. It was established merely by argument and inference. In this case the adultery was distinctly and clearly proved, and was admitted by the counsel at the bar. It could not indeed be denied. The next point, and

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the great and material point in cases of this kind, was the concealment of the birth of the child. In the *Banbury* Peerage case, that was open precisely to the same observation I have made as to the other point, it was not distinctly and clearly proved as a matter of fact, but was collected by arguments and by inference. In the present case it was proved with the utmost precision and distinctness, and, like the other point, so overwhelming was the evidence, that it was admitted by the counsel at the bar in the course of their argument as a fact distinctly established.

The third material point in cases of this kind, namely, the acknowledgement of the child by the adulterer, was also contested in the *Banbury* Peerage case. Here it was proved by an abundance of evidence, which rendered it impossible to doubt it; and that point also was admitted by the learned counsel at the bar. These three material and essential points, which were the great points on which the *Banbury* Peerage case turned, all exist in this case, and are established by irresistible evidence.

Then again, with respect to the disposition of the property, an argument was drawn, and fairly and properly drawn, in the *Banbury* Peerage case, from the circumstance of Lord *Banbury* alienating his property and taking no notice of his supposed child. That fact exists in this case in a manner quite clear, and, if I may so express myself, with much emphasis, for what did the father do? Having quarrelled with his daughter in consequence of her marriage, one would have supposed, under those circumstances, that if he found it necessary to make a new will, and he found he had a son, he would have noticed this son in the will, and have disposed of the property in favour of the son; but he takes no notice of his sup-

posed son, but gives the property to his nephew. He afterwards is reconciled to his daughter, revokes the will, and gives her the whole property, and describes her either in that or some other instrument as his only child. It is quite clear that up to the day of his death, which was thirteen years after the birth of the child, he never knew of the birth of the child. He had heard a rumour, which he communicated to his wife, and she distinctly and positively contradicted it.

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Then, my Lords, with respect to the adultery. In the case of the *Banbury* Peerage, the disposition of Lord *Vaux's* property in favour of *Nicholas*, was made use of as an argument for the purpose of showing that he was a son of Lord *Vaux*, and not of Lord *Banbury*. The same argument exists in this case, and the same state of facts. This young man, Mr. *Austin*, makes his will, and passes over his father and mother, persons in a distressed situation or a low situation of life, to whom the property would have been of great importance, and disposes of his property in favour of this child, whom he has uniformly acknowledged as his own. In the *Banbury* Peerage case, there was no register of baptism; in this case, there is a register of baptism produced and proved, in which he is described as a base-born child. It appears to me, that every inference that could fairly be drawn from the facts in the *Banbury* Peerage case may be drawn in this case, and that the evidence is more distinct, more precise, and more conclusive in every part of this case, than it was in that celebrated case.

Then the learned counsel at the bar draw this distinction between the *Banbury* Peerage case and the present. They say that here the husband and the wife are constantly brought together, and that did

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not appear in the *Banbury* Peerage case. The Noble and Learned Lord on the woolsack has entered into that part of the case, and has shown that there is no foundation for that observation. The learned counsel at the bar assumed it as a fact that they were living together; it was stated and assumed as a fact in the argument of Lord *Erskine*, and was never controverted; it was taken throughout as a fact not to be disputed. I am aware of an observation which was made by the counsel at the bar as to the word "access," which occurs in part of the argument of Lord *Eldon*; but I agree with Sir *Harris Nicolas*, that that is inconsistent with the rest of his argument, and that there must be some mistake in the report. There is nothing to show that they did not live together; and, as has been stated by the Noble and Learned Lord on the woolsack, it must be taken, as these parties were not separated, and as there was no evidence to show any variance or difference between them, that they did live together; and so it was admitted during the whole of the argument. But, my Lords, they are brought together on the particular occasions which have been referred to by my noble and learned friend, one of which was the occasion of levying the fines; and in the different instruments that are executed, he describes his wife on one or two occasions as his loving wife, in terms of endearment, and he disposes of his estate in her favour. All these circumstances show, not only that there was no variance or hostility between them, but that they were on the best possible terms. We, therefore, are unable to suppose that there was no access, that is, no personal approach between them; for if we refer to the evidence in the case, the evidence of *Mary Ogden* and the evidence of *Edward Wilkinson*, there is no doubt

they were constantly together; and no person reading the whole of the case,—which I have read, with the view of ascertaining this point, and seeing what impression the facts make upon my mind,—nobody can entertain a doubt that they were living together, and therefore there is no foundation for that distinction, which has been endeavoured to be drawn between this case and the case of the *Banbury* Peerage. The conclusion I have come to is this, that upon all the evidence, giving my best attention to it, it operates upon my mind to produce the thorough, entire, and absolute conviction, that this child was not the child of Mr. *Morris*, but that it was the child of the paramour or adulterer, *William Austin*.

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Decree affirmed, without costs.

A P P E A L S

FROM THE COURT OF CHANCERY IN IRELAND.

1836:
 Feb. 22. 29.
 March 1. 7, 8.
 10 and 14.

ROBERT EDWARD, Viscount LORTON, and }
 the Hon. ROBERT KING - - - } *Appellants*.

1838:
 January 23.

GEORGE, Earl of KINGSTON, and Others, *Respondents*.

AND

GEORGE, Earl of KINGSTON - - - *Appellant*.

ROBERT EDWARD, Viscount LORTON, and }
 the Hon. ROBERT KING - - - } *Respondents*.

Sir *H. K*—being, in 1722, in possession of estates A and B, by virtue of a limitation, in a deed dated 1689, to him for 99 years, remainder to his first and other sons, in tail male, in strict settlement; with similar limitations to his brother *R. K*. and his issue, remainder to his sisters in

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 of Deeds.*

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tail,—by an indenture of settlement, covenanted with *R. K.*, the sisters, and also the trustee to preserve &c., to levy fines and suffer recoveries (levied and suffered accordingly), to the use, as to estate *A*, of *R. K.* in fee; and as to estate *B*, to trustees for sale, but if not sold (as happened), to the use of Sir *H. K.* for life, remainder to his first, &c. sons, in strict settlement; to which last uses estate *A* also devolved at *R. K.*'s death in 1725, by virtue of an indenture executed by him in 1724. Sir *H. K.* afterwards, claiming to be seised in fee of both estates, devised them to his younger sons *E.* and *H.* in moieties, for their respective lives, remainders to their first &c. sons, respectively, in tail male. After Sir *H. K.*'s death in 1739, *R.*, his eldest son (afterwards Lord *K.*), entered into possession of both estates, and suffered recoveries. On his death without issue in 1755, *E.*, his brother and heir, and *H.* claiming as his devisee, instituted suits against each other, which they terminated by agreement, confirmed by Act of Parliament, securing to *H.* for life and to his issue both estates, whether Sir *H. K.* had power to devise them or not; remainder to *E.* and his issue in tail, so far only as Sir *H. K.* had power to devise them. HELD, 1st, That Sir *H. K.* did not acquire the fee of the estates, and had no power to devise them; 2d, That *R.* (Lord *K.*) acquired the fee and died so seised, and if he died intestate, *E.* was entitled to the reversion in fee, expectant on the estate vested in *H.* by the agreement and Act; and 3d, That no case of election arose on Sir *H. K.*'s will between *E.* and *H.*, or *E.* and his eldest son.

*Trials of
Issues.
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of Evidence.*

On the trial of an issue, whether *R.* (Lord *K.*) died intestate, the parties being at liberty to read all the evidence that was read in the cause, depositions of a witness in former suits between *H.* and *E.*, and *E.*'s eldest son, who had the same interests in the question as the parties to the issue, were read, to this effect:—Deponent was employed by *H.* in 1758, and by *E.* in 1775, to inquire of Mrs. *R.* concerning a will made by *R.* in 1746 (an extant counterpart was in evidence), and she informed him on each occasion, that being at *R.*'s house in 1752, she went into his dressing-room, and he being at a bureau there open before him, upon seeing her, took out a parchment writing, and said it was a will he had formerly made for particular purposes (then satisfied), and he bid her throw it in the fire, for he had no further use for it, and did not intend it to stand good, and she accordingly threw it in the fire, where it was burned in presence of *R.* and herself; after which he told her he had

a counterpart in the hands of *M. W.* and he would take it from him and cancel it, for he did not intend it to stand good. Witness reduced this statement to writing, and after *Mrs. R.* read and approved and signed it, he sent it to *H.* in 1758, and to *E.* in 1775. The jury found a verdict of intestacy, saying, that they had taken *Mrs. R.*'s declaration into their consideration. **Held**, reversing an order for a new trial, 1st. That the depositions were admissible, not to prove the facts stated in *Mrs. R.*'s declaration, but that it was known to *E.* and *H.* and, (by means of other evidence,) to *E.*'s eldest son, who, as well as *H.*, having the same interests under the will as the plaintiff in the issue, and knowing, or having the means of knowing, the facts relating to the cancellation of the will, abandoned it, as invalid. 2d. That, without these depositions, there was sufficient evidence, unobjected to in the cause, (pleadings, depositions, and a decree in former suits, an agreement and Act of Parliament, and other acts of parties having the same interests as plaintiff, inconsistent with the validity of the will,) to warrant the verdict, and to satisfy the conscience of the Judge in equity—the only object of directing issues. 3d. That pleadings and depositions, and a decree in a former suit, the same will being in issue, were admissible, as showing the acts of the parties who had the same interests under the will as the plaintiff. 4th. That though an heir, against whom a will is set up, is entitled, of course, to an issue, a party setting up a will against him is not; and this being the case here, and the facts to be tried being incapable of living testimony, an issue ought not to have been directed. 5th. That a Judge in equity is not to order a new trial of an issue on the ground of reception of illegal, or rejection of legal evidence, or misdirection of the Judge on the first trial, if he is enabled to administer the equities between the parties without another trial. 6th. That as no injury resulted from an omission, in the order directing the issue, of a reservation of just exceptions to the evidence read in the cause, the omission is not a subject for appeal after the trial. 7th. And if after the deaths of all witnesses who could have spoken to the will, which, while they lived, was, after investigation by the parties interested, and under advice, abandoned as invalid, a jury found a verdict in its favour, a court of equity ought not to act upon it.

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THE property, forming the subject of the suits out of which these appeals arose, consists of lands in the

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county of *Sligo*, called *Carrigeaghs*, otherwise *Alts*, *Templevanny*, *Trinemore*, *Trinemacmurtagh*, *Trin-scrabagh* (which, for brevity, are herein called the first class of lands), and *Cloon* and *Burrin*, otherwise *Ballindoon* and *Barrow* (which, for the same reason, are called the second class). The Appellants in the first appeal claim to be entitled, Lord *Lorton* as tenant for life; and his eldest son, *Robert King*, as tenant in tail in remainder, to all those lands, under the will of *Robert*, late Earl of *Kingston*, devisee in fee under the will of *Edward*, first Earl of *Kingston*, who was next brother and heir-at-law of *Robert*, Lord *Kingsborough*, who died in 1755, seised in fee and intestate, as the Appellants insist, while the Earl of *Kingston*, Respondent in the first, and Appellant in the second appeal, contends that he, Lord *Kingsborough*, was not so seised, and had no power to devise the said lands; or, if he had, that he left a will, dated the 14th of *February* 1746, containing a devise under which the Earl of *Kingston* is entitled. The Lord Chancellor of *Ireland* having been of opinion that Lord *Kingsborough* was seised in fee, directed an issue to try whether he died intestate as to his freehold lands, and there being a verdict for intestacy, his Lordship made an order for a new trial. The first appeal is against that order. The second, or cross appeal, questions the seisin in fee of the alleged testator, and also complains of the orders directing the issue and the new trial of it, so far as they gave the parties liberty to use at such trial all the proofs read at the hearing of the cause, consisting partly of various deeds, depositions, and pleadings hereinafter mentioned.

By indenture of release, dated *February* 1689, *Robert*, second Baron *Kingston*, settled the whole of the said lands, together with the bulk of his family

estates, in default of issue male of his own body, to the use of his uncle, Sir *Robert King*, for 99 years, if he should so long live, with remainder to trustees during his life, with remainder to Sir *Robert's* then eldest son, *John King*, for 99 years, if he should so long live, with remainder to trustees during his life, with remainder to *John King's* first and other sons successively in tail male, with remainder to Sir *Robert's* then second son, *Henry*, afterwards Sir *Henry King*, for 99 years, if he should so long live, with remainder to trustees during his life, with remainder to *Henry's* first and other sons successively in tail male, with similar limitations to Sir *Robert's* youngest son *Robert King* and his issue, with remainder to the daughters of Sir *Robert* in tail.

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The estates comprised in that settlement devolved, in 1720, upon *Henry* (then Sir *Henry*) *King*, under the limitation to him for 99 years; and by indenture of release and settlement, dated *April* 1722, he and his brother *Robert*, and their two surviving sisters (who were the first tenants in tail in esse under the settlement of 1689), conveyed all the said lands to *John French* (the surviving trustee to preserve contingent remainders under that settlement) and others, and covenanted to levy fines to them in fee, and to suffer recoveries; and it was declared that such fines and recoveries (which were shortly after levied and suffered) should enure, as to the first class of lands, to the use of *Robert King* in fee; and, as to the second class, together with other lands, to the use of *T. Marley*, *A. French*, and *R. French*, in trust to sell them, and out of the produce to pay certain debts and sums of money therein specified, with a proviso that if those lands should not be sold within seven years, they should result to Sir *Henry* for life, remainder to

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his first and other sons successively in tail male, according to the uses in strict settlement thereby limited of the bulk of the family estate.

Robert King, according to that arrangement, entered into possession of the first class of lands; and by an indenture of release and settlement, dated *August* 1724, in consideration of his then intended marriage with *Frances Smyth* (afterwards duly solemnized), he settled them to the use of himself for life, with remainder, subject to his intended wife's jointure, to the use of the first and other sons of the marriage in tail male, and in default of such issue to such uses as he (the settlor) should appoint; and in default of appointment, to the use of his sons by any future marriage, with remainder to Sir *Henry*, and his first and other sons in strict settlement; and by the same settlement other lands, of which *Robert* was seised in fee, were limited in default of issue to the use of himself in fee. He died in 1725 intestate, without issue, and without having exercised the power so reserved to him over the first class of lands, and they thereupon devolved to Sir *Henry* for life, remainder to his first and other sons, in strict settlement; and *Robert's* other lands descended to Sir *Henry* as his heir-at-law. The lands of the second class were not sold under the trusts of the settlement of 1722, and therefore, at the end of seven years from that date, they reverted to Sir *Henry* for life, with remainder to his first and other sons, in strict settlement,—according to Lord *Lorton's* statement, which was controverted by the Earl of *Kingston*, who stated in the pleadings hereafter mentioned, that the said lands were sold, and purchased by Sir *Henry*.

Sir *Henry King* had issue three sons, *Robert*, *Edward*, and *Henry*; and by his will, dated *June*

1734, he devised by name all the lands which, by the settlement of 1724, were limited, in default of issue of *Robert King* (the settlor), to himself in fee, and which the will stated descended or came to Sir *Henry* on the death of his said brother, and also the second class of lands, upon certain trusts for the benefit of his two younger sons, *Edward* and *Henry*, and their issue. Sir *Henry*, after the date of this will, became entitled to other lands in the county of *Sligo*, and amongst them to certain lands called *Carriglass*, under the will of *William King*, dated December 1736, and by a codicil to his will, dated *January* 1739, he devised all the lands which came to him upon the death of his brother *Robert*, and the lands purchased by him from the trustees of his marriage settlement (of 1722), and also the lands devised to him by *William King*, to certain persons therein named, as to one moiety, after a term of eleven years from the date of the codicil, to the use of *Edward* for life, (with power to him, when in possession, to charge his moiety with a jointure and younger children's portions,) remainder to *Edward's* first and other sons successively in tail male, with remainder to Sir *Henry's* youngest son *Henry* for life, remainder to *Henry's* first and other sons successively in tail male, with remainders over; and as to the other moiety, after nineteen years, to the same uses as the first moiety, except that such second moiety was limited to *Henry* and his issue before *Edward* and his issue; and the testator declared that if such of his sons as should at any time be his eldest son should die, and the estate settled upon the testator's marriage should descend and come to his second or one of his younger sons, such son as should have the settled estate should not take any of the lands thereby devised, but the same should go to his next

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son under the limitations and with the remainders over aforesaid, his meaning being (his paternal estate, which would go to his eldest son, being a sufficient provision for him), that all the remainder of his real estate, whether left to him or fallen to him, should be divided among his younger sons, and if only one such son, the whole to him.

Sir *Henry King* died in 1739, whereupon his eldest son, *Robert* (afterwards created Lord *Kingsborough*), became entitled to a legal estate in tail male in the first class of lands, under the settlement of 1724, and to a similar estate in the second class, under the settlement of 1722, and to an equitable estate in tail male in both classes under the settlement of 1689 (a); and upon attaining his majority in 1745, he entered into the actual possession of both classes in common with the rest of the family estates, and in 1746 suffered recoveries, whereby he acquired the fee simple, and he continued in possession up to his death, and exercised several acts of ownership over both classes of lands.

Edward, the second son (afterwards Sir *Edward King*, Bart., and subsequently Earl of *Kingston*) attained twenty-one in 1746 or 1747, and *Henry* in 1753, and upon attaining their respective ages they entered into possession of their respective moieties of the lands expressly devised by Sir *Henry's* will, except the second class, which they never claimed against their elder brother. Sir *Edward* married in 1752, and on that occasion executed articles, whereby he agreed to charge his moiety with a jointure for his intended wife, and with portions for his younger children.

In *May* 1755, *Robert*, Lord *Kingsborough*, died without issue, leaving his next brother, Sir *Edward*,

(a) This statement was not admitted by the Earl of *Kingston*.

his heir-at-law. Sir *Edward* being then in *France*, his brother *Henry* caused the papers of Lord *Kingsborough* to be searched, and there was found among them a paper purporting to be his will, dated *January* 1752, and devising all his real estates to *Henry* for his life, with remainder to his sons in strict settlement, with remainders to Sir *Edward* and his sons, with a clause directing *Henry* to convey to Sir *Edward* his moiety or share of the lands devised to them by Sir *Henry*, their father. *Henry*, relying upon that will, entered into possession of all the estates, and also possessed himself of the title-deeds and papers of Lord *Kingsborough*. Sir *Edward* returned to *Ireland* in *June* 1755, and setting up his title as heir, prepared to dispute the will, believing it not to be a genuine instrument. *Henry* at the same time filed a bill against him in the Court of Chancery in *Ireland*, stating the devises in the will, and praying to perpetuate the testimony of the surviving witnesses to it. Sir *Edward* put in his answer in *July* of the same year, insisting on his title as heir, or else, under the settlement of 1722, or other settlements, in case it should appear that *Robert*, Lord *Kingsborough*, had no power to devise; and he shortly afterwards commenced proceedings in ejectment against *Henry* for recovery of the family estates lying in the county of *Roscommon*.

In *November* 1756, *Henry* filed a second bill against Sir *Edward*, stating, amongst other things, that *Robert*, Lord *Kingsborough*'s desk was sealed immediately upon his death, and afterwards opened, and search made amongst his papers, when the will of 1752 was found; and that Sir *Edward* shortly afterwards returned to *Ireland*, set up his title as heir, and afterwards offered to refer matters to arbitration; and further stating, that *Henry* had, in accordance with the

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said will, offered to convey to Sir *Edward* all the lands devised to them by Sir *Henry*, but that Sir *Edward* would not accept of such conveyance; and praying that Sir *Edward* might set forth an account of all the lands which passed by Sir *Henry's* codicil, to or in trust for his younger sons. Sir *Edward* put in his answer to that bill within six days (*b*); stating, amongst other things, that he received a letter from *Henry*, in August 1756, offering to make over to him all the estate of which he was possessed by virtue of his father's will; and that about a month previously *Henry* had made him a verbal offer to the effect in the bill stated; and that upon mention being made to him by Sir *Edward*, several months before, that Sir *Henry* had devised some lands to Sir *Edward* and *Henry*, which they were not in possession of under his will, and of which *Henry* took possession upon the death of *Robert*, Lord *Kingsborough*, *Henry*, after consideration, told Sir *Edward* that he had been advised by *Mark Whyte*, his attorney, that Sir *Henry* had no power to devise the said lands, and that he was restrained from devising them by a settlement made by *Robert*, late Lord *Kingston*, and that *Mark Whyte* had advised him not to give up such lands to Sir *Edward*. To this answer were attached schedules, one of which purported to contain the lands of which Sir *Henry King* died seised in fee, to the best of the knowledge and belief of Sir *Edward*; and comprising, together with others, the first and second class of lands above-mentioned. Another schedule purported to contain the lands which were limited to Sir *Edward* by the said will of 1752, as the lands a moiety of which *Henry* was possessed of, to the best of Sir *Edward's* knowledge and belief, and which did not comprise any of the lands forming the

(*b*) The hurry in which the pleadings were got up, was urged as an excuse afterwards for retracting some of the statements.

first and second class, except that *Carrigass*, otherwise *Alts*, was inserted by mistake instead of *Carri-glass*, the name of other lands which did pass by Sir *Henry's* devise to his younger sons.

It appeared, in the course of the litigation, that Lord *Kingsborough*, in 1746, executed a will in duplicate, drawn by *Mark Whyte*, his attorney, one part of which he took himself, and left the other with *Mark Whyte*. This will purported to devise his estates in strict settlement to his brothers, Sir *Edward* and *Henry*, and their sons, beginning with Sir *Edward*, with remainder to his sisters in tail; and with a clause directing Sir *Edward* to convey to *Henry* in fee the lands devised by Sir *Henry*, their father, and it gave legacies to the sisters, and to a natural child of Lord *Kingsborough*. The fact of the execution of this will being known to *Henry King* and *Mark Whyte*, who had got one part of it in his possession, but being unable to find the other, they, about this period of the litigation, employed Mr. *Hammersley*, a solicitor in *London*, to see Mrs. *Riddick*, who then resided there, but who had formerly lived with Lord *Kingsborough*, and to make inquiries of her respecting such will. Mr. *Hammersley* accordingly saw her at different times, and she informed him, that being at Lord *Kingsborough's* house at *Boyle*, in the county of *Roscommon*, in the year 1752, she accidentally went into his Lordship's dressing-room one day, when she found him sitting before a bureau that was open, and the upper fold or leaf thereof let down; and that his Lordship, upon seeing her come into the room, put his hand into one of the upper holes of the bureau, and took out a parchment writing, which he showed her, and said it was a will he had formerly made, at a time when he had a daughter living by *Madame de la Rive*, and contain-

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ing a provision for her, and also for his Lordship's sisters; and his Lordship added, that his sisters were then married and provided for, and he gave the said parchment writing into her hands, bidding her to read it; but that she found it so cramped or difficult that she could not read it, and told him so, asking what she should do with it: and thereupon he bid her throw it into the fire, for he had no further use for it; he did not intend it to stand good, or to that effect; and that she did accordingly immediately throw it into the fire, where it was burned in the presence of his Lordship and herself; and that either immediately before or after the same was so burned, his Lordship told her he had a fellow or counterpart of it in the hands of *Mark Whyte*, in *Dublin*, and that the first time he went there he would take it from him and cancel it, for that he did not intend it to stand good, or to that effect.

Mr. *Hammersley* reduced this information from Mrs. *Riddick* to writing, and she, after reading it in his presence, signed her name to it, and he sent the writing so signed to *Mark Whyte*. That information was concealed by *Henry King* and *Mark Whyte* from Sir *Edward King*, who, though he became aware that Mrs. *Riddick* had signed some paper, continued ignorant of the contents of it until about the year 1775, up to which time he believed that it related to the execution of the will of 1752.

In *January* 1757, Sir *Edward King*, while his ejectment for the *Roscommon* estate was depending, filed a bill in Chancery against *Henry King*, and also against *Mark Whyte*, who was a trustee under the will of 1752, stating that Sir *Edward* was entitled, under the settlement of 1722, or as heir-at-law of *Robert*, Lord *Kingsborough*, to all the real estate of which his Lordship died seised, and that *Henry King* went to *London* and

got Mrs. *Riddick* to sign a paper relative to the execution of the will of 1752; and that *Henry King* and *Mark Whyte* had got such paper in their possession. *Henry King* answered that bill in April 1757, and in the same month *Mark Whyte* put in his answer, and thereby stated that he believed that *Henry King*, in 1756, went to *London*, where Mrs. *Riddick* resided, and that she related what she knew concerning the execution of said will (of 1752) to a gentleman of character and credit, who was employed by *Henry*, and who reduced the same into writing, signed by her; and he admitted that he had a copy of her statement, but insisted that he ought not to produce it, it being evidence for *Henry King*, his client.

In May 1757, Sir *Edward* obtained a verdict in his ejectment cause for the estate in *Roscommon* against the will of 1752, and afterwards recovered judgment, but *Henry* brought a writ of error, and having failed therein, appealed to the House of Lords.

Towards the end of the year 1757, *Mark Whyte* produced an extant counterpart of the will of Lord *Kingsborough* before-mentioned as dated February 1746 (the instrument now in question in these appeals), and in December of the same year Sir *Edward* filed a second bill against *Henry* and *Mark Whyte*, and also against *Robert King*, an infant, the eldest son of Sir *Edward*, stating that Sir *Edward*, as heir male by virtue of some family settlements, or as heir-at-law of Lord *Kingsborough*, was entitled to all the estates; that *Mark Whyte* was examined as a witness for *Henry King* on the trial of the ejectment, and concealed the fact of a former will executed by Lord *Kingsborough*; that a verdict was found on such trial against the will of 1752, and judgment recovered, but a writ of error was brought by *Henry King*; that an accommodation

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was afterwards proposed between Sir *Edward* and *Henry*, and when terms were nearly settled, and Sir *Edward* had agreed to them, *Mark Whyte*, or *Henry King* by his desire, said he had another will made in 1746; that Sir *Edward* afterwards saw such will, and finding that it referred to another part in *Mark Whyte's* possession, Sir *Edward* asked where it was, and *Mark Whyte* replied that he supposed Lord *Kingsborough* had it, as he, *Whyte*, had returned to Lord *Kingsborough* the part originally lodged with him, and that Lord *Kingsborough* afterwards gave him the part he then had as a precedent to draw another will; and the bill charged, that Lord *Kingsborough* cancelled the one part, but forgot to cancel the other, which *Whyte* then produced, and insisted that cancelling the one part was sufficient; and it charged that *Henry King* and *Mark Whyte* did not find the other part amongst Lord *Kingsborough's* papers. The bill then stated that Sir *Edward* asked *Whyte* if there was another will executed in 1748, and he said yes, and two parts executed, and the contents much like the will of 1746; that Lord *Kingsborough* had one part, and he, *Whyte*, the other; but that he, *Whyte*, did not know what became of either, and such bill prayed that *Whyte* and *Henry King* might set forth what wills were executed by Lord *Kingsborough* after 1746, and whether that will of 1746 was not cancelled.

Henry King answered this bill in *February* 1758, and in the same month *Mark Whyte* put in his answer, and thereby stated he had been solicitor to Sir *Henry King*, and afterwards to Lord *Kingsborough*, and got into his possession several of the title-deeds, and that *Henry King* got possession of all the title-deeds and papers which were in Lord *Kingsborough's* possession at his death; that he believed the papers of Lord

Kingsborough were narrowly searched and examined, and that no will was found amongst them except that of 1752, and the draft part thereof drawn by him, *Whyte*, and two loose sheets of paper, written, as he believed, by Lord *Kingsborough*; that he, *Whyte*, had then in his custody a will of Lord *Kingsborough*, dated the 18th of *February* 1746, and he admitted that he did not disclose that fact in his answer to Sir *Edward*'s former bill; that he then considered the will of 1746 to be of no value, and omitted to mention it in his said answer, as a thing immaterial: that according to the best of his remembrance, he did upon his examination on the trial of the ejectment declare, as the truth was, that Lord *Kingsborough*, some time at the latter end of 1751, delivered to him the said will of 1746, and directed him to prepare a draft of another will, and by such draft to limit his real estate in the first place to his brother *Henry*, in the same manner and with the same power as the same stood limited to Sir *Edward* in the will of 1746, and that he, *Whyte*, accordingly drew so much of the will of 1752 as appeared to be in his handwriting from the will of 1746; that he, *Whyte*, attended a meeting on the subject of the proposed accommodation, and produced the will of 1746, upon the face of which it appeared, that one part had been lodged in his (*Whyte*'s) hands, and that in answer to a question by Sir *Edward*, whether he, *Whyte*, had the other part of such will, he answered, and as he believed the truth to be, that he had given it back to Lord *Kingsborough* in his lifetime, and that Lord *Kingsborough* had afterwards given him the part then produced, in order to prepare the draft of another will by it, and that he, *Whyte*, did not take upon himself to distinguish whether the will of 1746, then

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in his hands, was the part originally lodged with him, or that which was originally kept by Lord *Kingsborough*; that he delivered to Lord *Kingsborough* the part of the will of 1746, originally deposited with him, *Whyte*, and that Lord *Kingsborough* gave him, in the end of 1751, and for the purpose before set forth, that part of the will of 1746 which then remained in his, *Whyte's*, hands, and which he produced at the said meeting with Sir *Edward*, and he admitted that he did not find any other part of the will of 1746 among Lord *Kingsborough's* papers; that in answer to Sir *Edward's* question, whether Lord *Kingsborough* had not executed another will at his, *Whyte's*, house, about the year 1748, he, *Whyte*, answered, that Lord *Kingsborough* had executed a will subsequent to that of 1746, but that he could not be so particular as to remember whether it was in the year 1748 or not; that the contents of it were much the same as to the real estate as that of 1746, and that there were two parts of it executed on parchment, and with all due solemnities; that one part thereof remained in Lord *Kingsborough's* own hands, and that the other part was deposited with him, *Whyte*; that he did not know what had become of either of such parts, except that he had no doubt Lord *Kingsborough* had got from him the part lodged in his, *Whyte's*, hands, and he believed no part of such will was among his, *Whyte's*, papers, or to that effect; and he did not recollect who were the subscribing witnesses (to the will of 1747), but believed he drew it from the will of 1746, or some copy or draft thereof, and that he had no other instructions for drawing the same; that he did not believe the said subsequent will was ever removed from the place in which he deposited it until he delivered the same to Lord

Kingsborough, and that he could not form any belief what was become of such subsequent will; that he believed he had not such subsequent will in his hands at the time Lord *Kingsborough* gave him the will of 1746 as a precedent to draw the draft of another will.

In *February*, 1758, Sir *Edward* filed a third bill against *Henry* and *Mark Whyte*, stating that *Henry* had got possession of the real and personal estate of Lord *Kingsborough*, but had neglected to pay Lord *Kingsborough's* mortgage or other debts, or to keep down the interest, and praying that Lord *Kingsborough's* personal estate might be applied in exoneration of his real estate, and for a discovery of all title-deeds. *Henry King* and *Whyte* put in their answers in 1759, and by *Whyte's* answer, Sir *Edward King* was informed for the first time of the existence of the deed of 1724, under the limitations of which the first class of lands reverted in strict settlement to Sir *Henry King*; but he or his agents did not get possession of such settlement, or become acquainted with its purport, until after the arrangement made between him and *Henry* in 1761, hereinafter stated.

In *April* 1758, *Henry King* filed his third bill against Sir *Edward*, stating the settlement of 1722, showing the first class of lands limited to *Robert King* in fee, and the second class to the trustees for sale; that *Robert* died without issue, leaving Sir *Henry King* his brother and heir-at-law; that Sir *Henry*, being seised as aforesaid, made his will and codicil before stated; that Lord *Kingsborough*, in 1746, conveyed all said lands in *Sligo* in said settlement to a tenant to the præcipe, and suffered recovery, and became seised in fee; that he employed *Mark Whyte* to draw the will of 1746, one part of which was then deposited in *Whyte's* hands, where the same remained for some time, and was afterwards by him delivered

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to Lord *Kingsborough*; that a coolness arose between Lord *Kingsborough* and Sir *Edward* about 1750; that Lord *Kingsborough*, in 1751, employed *Whyte* to prepare another will, and limit the estates to *Henry* for life, &c.; and about *December* 1751, delivered to *Whyte* one part of the will of 1746, as a precedent to draw the new will by, with directions to substitute *Henry* and his sons in the place of Sir *Edward* and sons; that *Whyte* accordingly prepared two parts of the new will, and sent or delivered the same to Lord *Kingsborough*, who locked them in his desk in his house in Dublin, and afterwards executed one of them there previous to his leaving Dublin; that he got three of his servants to attest the will of 1752; that he afterwards removed that will and all his papers to *Boyle*, and put the same in his desk there, and in 1755 he went to *Boyle*, and soon after sat down to prepare a will, and wrote a great part thereof, which after his death was found written upon two sheets of paper, and the other part, or duplicate of the will of 1752, in *Whyte's* writing, was found with the will of 1752 in his desk at *Boyle*; that Lord *Kingsborough* was seised with paralysis in *April* 1755, when his keys were taken charge of by his agent, Mr. *Dodd*, and that his desk was never afterwards opened till the 2d of *June* 1755, when several gentlemen attended, the seals were broken, search made, and the will of 1752 only found with the duplicate draft of it, and two sheets of letter-paper partly written upon.

In *April*, 1758, Sir *Edward King* put in his answer (seven days after the bill was filed) (c), whereby he admitted the settlement of 1722, the death of *Robert King*, and that Sir *Henry King* being seised, made his will and codicil, as in the bill stated; that

(c) See note to p. 278, *ante*.

he believed Lord *Kingsborough* suffered a recovery of all the said lands, but did not know whether he acquired the fee; that he heard and believed that two parts of the will of 1746 were executed, and that one of them was deposited in the hands of *Whyte*, where he believed it remained to the death of Lord *Kingsborough*; that he heard, but did not believe, that Lord *Kingsborough* at any time delivered to *Whyte* a part of that will, to be made use of as a precedent for the will of 1752, or that the will of 1746 was at all given to *Whyte* by Lord *Kingsborough*, except the duplicate; on the contrary, he believed that the part of the will of 1746, which Lord *Kingsborough* at first kept in his own hands, and which he believed was the same produced by *Whyte*, remained in the custody of Lord *Kingsborough* till his last sickness; and that during his illness, or shortly after his death, the same was fraudulently taken from among his papers, and secreted by *Whyte* or some other person; that he believed *Whyte* prepared the will of 1752 from the part of the will of 1746 deposited with him; but that Lord *Kingsborough* never executed the will of 1752; that *William French* was in the house of Lord *Kingsborough* during his last illness; and that on the night of his death he caused the desk, and other places where his valuable papers were kept, to be sealed up; and that he and others were present when the seals were broken, and search made, on the 2d June 1755; and that no will was found except that of 1752; that upon the death of Lord *Kingsborough*, he, Sir *Edward*, became entitled to the estates, as eldest issue male of Sir *Henry*, by virtue of the settlement of 1722, and of the ancient settlements in his family, or as heir-at-law of Lord *Kingsborough*; that he believed the name *Kingsborough*,

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subscribed to the will of 1752, was not the handwriting of Lord *Kingsborough*; that the will of 1746 was not disclosed by *Whyte* on his examination on the trial of the ejectment; that he believed *Whyte* would never have mentioned that will, if it had not happened that he, Sir *Edward*, and *Henry*, had lately, by the interposition of friends, come to an amicable composition, and all the terms thereof had been agreed upon, one of which was, that *Henry* consented to waive his said will (of 1752), and in order to ratify the same, a draft of an Act of Parliament, which the parties agreed to apply for, was actually drawn by Sir *Edward's* counsel, and laid before *Henry's* counsel; and then *Whyte* produced the will of 1746, in order as he, Sir *Edward*, believed, for his private advantage, to frustrate the compromise and continue the litigation.

To this answer was annexed a schedule, in which the lands of *Carrigass*, otherwise *Alts*, part of the first class of lands, were by mistake inserted, instead of the lands of *Carriglass*, amongst the lands, of which Sir *Henry* was clearly seised in fee; and in the same schedule Sir *Edward* insisted that the several other lands comprised in the first and second class, together with others, passed by the will and codicil of Sir *Henry* to his two younger sons; but he stated that a question in law arose which had not yet been determined, whether Sir *Henry* died seised in fee of or had power to devise such last-mentioned lands.

In June, 1759, *Henry King* filed an amended bill, generally of the same import as his third original bill, praying amongst other things an account of Lord *Kingsborough's* debts and real estate, and that a competent part of such estate might be sold for payment of his debts.

To that bill Sir *Edward* put in a plea of the verdict and judgment in the ejectment cause, which was allowed, and *Henry* thereupon appealed to the House of Lords.

In December 1760, an arrangement proposed some time before between the two brothers was concluded, and afterwards reduced into form by a deed dated *May* 1761, and made between Sir *Edward King*, therein described as brother and heir-at-law of Lord *Kingsborough*, of the one part, and *Henry King* of the other part, by which deed—after reciting Sir *Henry King's* will and codicil; the death of *Robert*, Lord *Kingsborough*, claiming at the time of his death to be seised in fee simple of considerable real estate in the counties of *Roscommon*, *Sligo*, and *Galway*; the discovery of the will of 1752 and *Henry King's* claim under it to the estates alleged to be thereby devised to him, and that he afterwards obtained administration of the goods and chattels of Lord *Kingsborough*, with the said instrument annexed as the will of Lord *Kingsborough*, and possessed himself of his personal estate; the ejectment brought by Sir *Edward*, and the verdict and judgment therein, setting aside the said will, and establishing Sir *Edward's* title to Lord *Kingsborough's* estates in the county of *Roscommon*, and that he took possession of the same; and further reciting the third bill filed by *Henry* for establishing the said will of 1752, and the proceedings therein, and several other suits of law and equity between them in respect of the real and personal estate of Lord *Kingsborough*, and that they had agreed to put an end to all controversies between them, and to obtain an Act of Parliament for carrying the agreement into execution;—It was witnessed, that in consideration of the premises, and in order to put an end to

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all disputes between Sir *Edward* and *Henry*, and in consideration of the covenants and agreements therein contained on behalf of *Henry*, Sir *Edward* released him from all claims in respect of his receipts of the personal estate and of the rents of the real estate of Lord *Kingsborough*; and covenanted, within the space of one year, to convey to him all the lands and hereditaments, which Sir *Henry King*, by his will and codicil, devised or intended to devise to them his younger sons, and so that *Henry* and his issue should have and enjoy the same under such limitations, and with such powers, and with such remainders, as were limited and appointed concerning the same by Sir *Henry's* will and codicil, in case Lord *Kingsborough* had died without issue male, and without barring the remainders limited of the family estate by the settlement of 1722. And it was declared that *Henry* should enjoy all the lands so agreed to be conveyed to him, whether Sir *Henry* had or had not power to devise the same. And it was further witnessed, that in order to put a final end to all disputes between them, *Henry* relinquished all right to all Lord *Kingsborough's* real estate, and agreed that the said verdict should be considered as a final and irreversible determination of the right of Sir *Edward* to such real estate as Lord *Kingsborough's* heir-at-law. And they covenanted that they would endeavour to procure an Act of Parliament to carry these several agreements into execution, and they agreed that they would also endeavour that all the real estate, whereof Lord *Kingsborough* died seised in fee simple or fee tail (the lands therein mentioned only excepted), subject to and charged with his debts which then remained unpaid, should stand limited to Sir *Edward* in fee, or to such uses as he should appoint.

By an Act of Parliament which, in pursuance of the last-recited covenant, Sir *Edward* and *Henry King* procured to be passed by the Parliament of Ireland in *April* 1762,—after reciting that *Robert*, Lord *Kingsborough*, upon the death of Sir *Henry King* in 1739, by virtue of several family settlements therein mentioned (not noticing the settlement of 1724), became seised, as tenant in tail male, of several lands and hereditaments also therein mentioned, subject to several debts and incumbrances, and that in 1746, after he had attained his age of 21, he levied fines and suffered recoveries of his estates in the counties of *Roscommon*, *Sligo*, and *Galway*, and further reciting to the same import as the recitals in the said deed of compromise, and that Sir *Edward*, by his marriage articles, agreed to settle his moiety of the lands devised to him by Sir *Henry's* will and codicil to the uses in the said articles mentioned, and that he had then issue one son, *Robert*, then a minor, and that *Henry* had no issue, &c.—It was enacted, that the agreement in the indenture of 1761, and all the covenants and agreements therein contained, should be binding and conclusive on Sir *Edward* and *Henry* and their respective issue, and all persons claiming under them or their issue, and that the said verdict should be conclusive to all the said persons and their issue; And for carrying the said agreement into execution, it was further enacted, that both the first and second class of lands, together with other lands therein mentioned, of which Sir *Henry King* was at the time of his death seised in fee, and which were devised by his will and codicil, and also certain leasehold estates thereby bequeathed, should be vested in and settled on *Robert French* and *Annesley Gore*, freed and discharged from all limitations and incumbrances in or by the said settlements, or

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the will and codicil of Sir *Henry*, or the marriage articles of Sir *Edward*, to the use of *Henry* for life, remainders as to so much of the said lands and premises as were fee simple, to the use of his first and other sons successively in tail male, and as to the leasehold interests to the first and other sons of *Henry* in succession who should attain 21 or die under that age having issue, and for default of such issue in trust as to all the said lands and premises, as well the fee simple estate as the leasehold interest, so far forth as Sir *Henry* had a right and power to devise, bequeath, and dispose of the same, and not otherwise, to the use of Sir *Edward* and such other persons in remainder for such estates respectively, and subject to such charges and limitations as Sir *Henry* by his will and codicil had declared concerning the same, as the provisions for his said two sons Sir *Edward* and *Henry*, and in lieu of the premises therein limited to the use of *Henry* and his issue male. And in satisfaction of every provision intended to be made for Sir *Edward's* issue by his marriage articles, certain lands in the county of *Roscommon* were vested in trustees, discharged from all limitations and charges created by the said settlements, or Sir *Henry's* will or codicil, or by any will or wills whatsoever (save as thereafter was saved) made, or alleged to have been made by Lord *Kingsborough*, to the use of Sir *Edward* and his issue male, remainder, in default of such issue, to such persons as would be entitled to the same if that Act had never been made. And to provide a fund for paying Lord *Kingsborough's* debts and the incumbrances affecting his real estate, and to indemnify *Henry King* against the same, other lands were vested in trustees, discharged from all uses of the settlements before stated, and of Sir *Henry King's* will, and of all

wills made or alleged to have been made by Lord *Kingsborough*, on trust by sale or mortgage to raise a fund to pay such debts and incumbrances, and 10,000*l.* to be applied as Sir *Edward* should appoint; and as to the residue of such trust lands remaining unsold or in mortgage, in trust for such persons as should be entitled to them if the Act had not passed. The Act, after several other provisions, lastly provided, that nothing therein contained should prejudice the remainders claimed by the sisters of Lord *Kingsborough* under a will executed by him the 18th of *February* 1746.

At the time the agreement was executed, and till about the time of passing the Act, Sir *Edward* was ignorant of the contents of the settlement of 1724, and was unable to ascertain what lands descended to Sir *Henry*, on *Robert's* death, as his heir-at-law, and what devolved to him in settlement; and being thus unable to distinguish the particular lands which Sir *Henry* had a right to devise from those over which he had no such power, and which latter devolved on Lord *Kingsborough* on Sir *Henry's* death, the Act was so framed as not to abridge Sir *Edward's* title as Lord *Kingsborough's* heir-at-law to the lands thereby given *Henry* upon the death and failure of issue male of *Henry*, if it should appear that Sir *Henry* had not power to devise the same. Sir *Edward* was at this time also ignorant of the real purport of Mrs. *Riddick's* declaration concerning the will of 1746, and the last clause in the Act, saving the rights of Lord *Kingsborough's* sisters under that will was inserted in consequence of a petition presented by one of the sisters, while the Act was in progress. At that time a case was prepared by the counsel of Sir *Edward*, and a copy thereof furnished to each of the husbands of the

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sisters, and, after being approved of on their behalf, the same was laid before Mr. *Charles Yorke*, with a view to satisfy the husbands of the sisters as to their claim under the will of 1746, and Mr. *Yorke*, in *October* 1762, after the Act was passed, gave his opinion that the will of 1746, and also that executed in 1747, were cancelled; and the sisters or their husbands set up no further claim under the limitations in the will of 1746, or in respect of the legacies purported to be given them by that will.

Henry King, by virtue of the Act, continued in possession of the lands thereby given him (including the lands now in question) from the date of that Act up to the time of his death in 1821. Sir *Edward* continued in possession of the bulk of the family estates, and nothing occurred with reference to the litigation between him and *Henry*, or in relation to Lord *Kingsborough's* will, until about the period of Sir *Edward's* eldest son attaining his age of 21 years, in 1775. In *June* of that year, Sir *Edward*, then Earl of *Kingston*, wrote a letter to his eldest son, *Robert*, Viscount *Kingsborough* (who was then in London), requesting him to concur in levying fines of the estates of which the Earl was then in possession, and which he considered himself to have in fee, and telling him that before he consented to levy such fines, he would have him fully satisfied that he did not give a power which the Earl had not already, but only clear up the title so fully that the Earl might be able to make such use of that power as might best serve his family. He then alluded to the extant part of the will of 1746, and said he would send his son the case laid before Mr. *Yorke* in 1762, with his opinion on it, and Mrs. *Riddick's* declaration, and a copy of the part of that will then in being,

to show it was the counterpart of that so destroyed. He added, that from those materials he begged his son would get a case drawn up and laid before such counsel for his opinion, and then he would be able to judge whether he could comply with what he, the Earl, desired, or not.

Viscount *Kingsborough* came of age in *July* 1775, and went to Dublin, where a case, founded partly on the statement made by Mrs. *Riddick*, was drawn out by the Earl, with the approbation of his son, and given to the son, who laid it before Mr. *Tisdale*, then Attorney-general of *Ireland*, and obtained his opinion relative to the cancellation of the will of 1746; after which the son joined with his father in suffering recoveries of the estates which the Earl was in possession of, but not including the lands now in question, which were then held by *Henry King* under the Act.

In *January* 1781, Viscount *Kingsborough* filed a bill against the Earl, his father, and the trustees for sale under the Act of Parliament, setting up the will of 1746, one part of which was stated to be then in his possession, and stating the litigation between Sir *Edward* and *Henry*, the compromise by the deed of 1761; and that it being impossible, by reason of the will of 1746, to carry the deed into effect without the aid of Parliament, they procured the Act of 1762 to give validity thereto; and that the *Roscommon* estate was thereby vested in the trustees for sale: that such trustees having sold part of the estate, and paid Lord *Kingsborough's* debts, the Earl formed a plan of prevailing on the plaintiff, on his coming of age, to join with him in suffering recoveries; that plaintiff was under the Earl's influence at the time, and ignorant of his title under the will of 1746, which the Earl

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knew to be a subsisting will, as appeared by a letter from Mr. *Glascock*, his attorney, dated *December 1760*.

In *June 1781* the Earl filed his answer, and stated, amongst other things, that he believed *Robert*, Lord *Kingsborough*, deposited one part of the will of 1746 with *Mark Whyte*, and kept the other for some time in his own hands; and that he cancelled and revoked that will; that the reason for applying for the Act of 1762 was, because under the will and codicil of Sir *Henry* and the defendant's marriage articles of 1752, defendant was made tenant for life, with remainder in tail to his sons, of certain lands of which defendant was in possession, and because it was part of the agreement with *Henry* that such estate should be then conveyed to *Henry* and his issue in present possession; that while the Bill for the Act was pending, defendant, with the consent and approbation of his sisters, caused a true state of the case relative to the wills of 1746 and 1747 to be laid before Mr. *Yorke*, who (after the passing of the Act) gave his opinion that both such wills were cancelled; that before the verdict against the will of 1752, *Henry King* directed Mr. *Hammersley* to apply to Mrs. *Riddick* relative to the will of 1752, and that she made the above-mentioned declaration relative to the burning of one part of the will of 1746; that defendant was told thereof many years afterwards by *Henry King*, and he sent to Mr. *Hammersley* to see Mrs. *Riddick*, to be informed again touching the cancellation of the said will; that he believed Mr. *Hammersley*, accordingly, in 1776, applied to her, and that she made the same declaration as before, and he believed that Mr. *Hammersley* reduced it into writing, and that she signed it in his presence; that in *June 1755*, defendant sent the

plaintiff (then in *London*) the case and opinion of Mr. *Yorke*, and Mrs. *Riddick's* declaration, and also a copy of the will of 1746, and that plaintiff remained in *London* two months, and had opportunity of seeing Mr. *Hammersley* and Mrs. *Riddick*; that the plaintiff, after his return to Ireland in 1775, told the defendant he had left the papers with a friend in *London* to get Mr. *Dunning's* opinion, but had no doubt it would agree with Mr. *Yorke's*, and desired the defendant to proceed to levy fines and suffer recoveries; that plaintiff, by a letter from *Dublin* of the 21st of *November* 1775, informed defendant he had got Mr. *Dunning's* opinion, and it agreed with Mr. *Yorke's*; that defendant then wrote to Mr. *Glascock* to prepare the recoveries; that previous to the fines and recoveries being levied and suffered, defendant gave plaintiff the will of 1746 (obtained by him out of the Court of Chancery, where it had been lodged by *Mark Whyte*), and Mrs. *Riddick's* declaration, and Mr. *Hammersley's* letter to defendant, which accompanied his evidence, and he disclosed to plaintiff every circumstance relating to the will of 1746, which defendant was then informed of; that plaintiff came of age six months prior to the recoveries being suffered, and had been married some years, and was in possession of a very large income, and employed Mr. *Lane* as his attorney; that defendant never allowed the will of 1746 to be a subsisting will, and had not possession of it until after the Act of Parliament was passed; and he admitted, that Mr. *Glascock* not being informed concerning the revocation of the will of 1746, or fully informed of all the other circumstances relative to the said will, wrote to the defendant the letter in the bill stated; that defendant offered to leave his title as it stood prior to suffering the re-

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coveries to the opinion of three eminent counsel in England (Mr. *Dunning* to be one), but that the plaintiff would not agree, relying, as the defendant believed, on the alteration of circumstances by Mrs. *Riddick's* death since suffering the recoveries.

In *February* 1781 the Earl filed a cross bill against the said Viscount *Kingsborough*, stating and charging the facts contained in his answer. In June following Viscount *Kingsborough* filed his answer, stating, amongst other things, that he believed Lord *Kingsborough*, in 1747 or 1748, duly executed a will, and that the limitations in it were much the same as those in the will of 1746. The answer then stated the account given by *Mark Whyte* in his answer February 1758, relative to those two wills and to the counterpart of the will of 1746, not having been found among Lord *Kingsborough's* papers, and referred generally to such answer. The answer further stated two letters from Mr. *Glascock* to the Earl, of *December* 1760, relative to the treaty for a compromise then on foot between him and *Henry*, and expressing a doubt whether Parliament would, on the concurrence of *Henry King* alone, conclude the will of 1746 as well as that of 1752, and give the Earl the fee, unless he could produce evidence of the will of 1747 having contained a devise of that nature to him; that defendant, Viscount *Kingsborough*, believed that so far from *Henry King* having given up his rights under the will of 1746, they were maintained and established by the Act; and he believed Mr. *Hammersley* took down the declaration of Mrs. *Riddick*, but that it was not made on oath, and was not true; but, admitting it to be true, that it might apply to the will of 1747, and not to that of 1746. The Viscount admitted having received from the Earl, in *London*,

the copy of the will of 1746, and Mrs. *Riddick's* declaration, and the case and opinion of Mr. *Yorke*, and admitted he might have had the advice of the most eminent lawyers, and have informed himself of the character and credibility of Mr. *Hammersley* and Mrs. *Riddick*; but that his confidence in his father's assertions of his being tenant in fee led him to consider it unnecessary. That he gave the above papers to a friend to get Mr. *Dunning's* opinion, who gave no opinion, but recommended an amicable settlement. That defendant, fearing the Earl would not be pleased with that answer of Mr. *Dunning*, wrote to the Earl that he got Mr. *Dunning's* opinion agreeing with Mr. *Yorke's*, but that was not true.

Both parties amended their respective bills by introducing into them the statements in their answers to the original and cross bills, and they put in their answers respectively to the amended bills.

The Earl, in his answer, insisted that the will of 1746 had been cancelled; that the Viscount had every means of ascertaining all the circumstances relative to it before he joined in suffering the recoveries; that the Earl had, before any bill was filed against him by the Viscount, offered to refer the matters in dispute between them to arbitration, and that if the arbitrators should be of opinion that the Earl had not the fee of the estates in him previous to suffering the recoveries, he would waive all benefit of them, and settle the estates on the Viscount, who refused to accede to that proposition, relying on the alteration of circumstances by the death of Mrs. *Riddick*, the only witness of the cancellation of the will of 1746.

The Viscount, in his answer, stated, among other things, that the Earl, in the arbitration referred to, drew up a narration, and submitted the same to the

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referees, in which he offered to refer the whole to three counsel in England (Mr. *Dunning* being one), and if they thought he had not the fee previous to the fines being levied, he would relinquish all power given by the fines, and settle the estates on defendant for life; that a few days before the recoveries were suffered, it had been rumoured among the friends of the family, that the Earl was upon the point of taking undue advantage of his paternal influence, and of the Viscount's youth and inexperience; and that Mr. *Tisdale*, who had been of counsel for *Henry King* in the several suits between him and the Earl, and was acquainted with every circumstance concerning the affairs and pretensions of both parties, declared his conviction that the will of 1746 was a subsisting will; that such report having reached the Viscount, he intimated the same to the Earl; whereupon the Earl, with the knowledge and approbation of the Viscount, stated an anonymous case, and before the suffering of the recoveries the said case was laid before Mr. *Tisdale*, who delivered an opinion therein in the words in the Earl's cross bill mentioned.

Evidence was gone into in the original and cross cause; and on the part of the Earl, *Holt Waring*, Esq., one of the attesting witnesses to the will of 1747, stated that Lord *Kingsborough* was in that year rescued by his brother *Edward* from a very embarrassing situation; that in *March* 1747 he executed a will in duplicate at *Mark Whyte's* house, to which he, *Waring*, was an attesting witness, and on walking home Lord *Kingsborough* told him there was a good deal of parchment in his will, but the purport of it was very short; that he had left everything to his brother *Ned*, except 5,000*l.* to his daughter by *Madame de la Rive*; that Lord *Kingsborough* had

two residences, one in *Dublin* and the other at *Boyle*, and his desks were searched shortly after his death by witness and *Christopher Glascock*, deceased; that *Henry King* was present at the search at *Boyle*, and *Mark Whyte* at that in *Dublin*, and that no will was found of a date prior to 1752.

Mr. *James Glascock*, who became the Earl's solicitor in 1758, on the death of *Christopher Glascock*, his father, stated, that on preparing the Act of Parliament in 1762, it appeared that Lord *Kingsborough's* debts at his death amounted to 79,000*l.*, besides the family debts then due amounting to 11,000*l.*, and that such debts far exceeded his personalty; that in December 1757 a treaty for compromise was set on foot between *Edward* and *Henry*, and instructions given to counsel for a Bill in Parliament to carry it into effect; but in a subsequent meeting, *Mark Whyte* (*Henry's* attorney) produced the will of 1746, and the same was insisted on by or on behalf of *Henry*, and thereupon the treaty was broken off; that the compromise was set on foot again in December 1760, on the basis of the terms agreed upon in 1757; that witness wrote the letters in the pleadings to Earl *Edward* in December 1760; that he was induced so to do from a conviction that *Mark Whyte* had or could produce the draft or other evidence of the will of 1747, by which *Whyte*, in his answer in Chancery, stated he had a legacy of 600*l.*, and witness advised the Earl to stand off, in the hope that *Whyte* would be obliged to produce such will; that the last clause in the Act of Parliament, relative to the will of 1746, was inserted on account of a petition having been preferred to the Privy Council in the name of Mr. *Wood* and his wife, one of Lord *Kingsborough's* sisters, claiming a legacy, and also a remainder in one-fourth of the

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estates under that will; and of the Earl's not having been sufficiently prepared with evidence to prove the cancelling of it or the contents of the will of 1747 and the session of Parliament having been then far advanced, it was thought prudent on the part of the Earl to submit to the insertion of such clause, rather than run the risk of the Parliament rising before the Act could be completed. Witness prepared the draft of the case laid before Mr. *Yorke* for his opinion by the Earl's direction, and with a view to satisfy Mr. *Wood* and the husbands of the other sisters as to their claim under the will of 1746; and such draft was settled by one of the Earl's counsel, and a copy of it furnished to each of the husbands of the said sisters or their agents, in order that the same might be laid before their counsel. Witness believed Lord *Kingsborough's* three younger sisters were married after the date of the will of 1746; that each of them received portions from him equal to their legacies in that will, and that such portions were presumed to be in satisfaction of said legacies, save that witness believed the husbands of the said three sisters claimed such legacies.

John Wallis, Esq., a subscribing witness to the will of 1747, stated that that will was on paper, and bore date the 23d of *March* 1747; that it was executed in duplicate at the house of *Mark Whyte*, in the presence of witness, *Holt Waring* and *James Hornidge*, deceased; that *Mark Whyte* was employed as Lord *Kingsborough's* attorney till the death of Lord *Kingsborough*, and afterwards by *Henry King*, and died in 1770.

The Rev. *William French* deposed that the desks and escrutoires of Lord *Kingsborough* at *Boyle* were searched, shortly after his death, by witness and Mr.

Knor, in the presence of *K. Dodd*, *Henry King*, and others ; that no will was found of prior date to 1752 ; that on the evening of his death *K. Dodd*, at *Henry King's* request, sealed up the desks, and kept the keys till the time of such search, when witness found the seals unbroken.

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Mr. *Hugh Hammersley*, attorney, stated that he was employed by *Mark Whyte* in an appeal case before the House of Lords in *England*, on behalf of *Henry King*, in 1758 ; that in the course of a previous correspondence, between 1755 and 1758, *Whyte* requested him, on behalf of *Henry King*, to see Mrs. *Riddick*, and make inquiry concerning a will supposed to have been executed by Lord *Kingsborough*, and dated 18th *February* 1746, particularly as to what she knew of any cancellation thereof ; witness accordingly saw her at different times, and she answered and informed him to the effect already stated (*d*), and that witness transmitted her declaration, signed by her, to *Mark Whyte* ; that witness was, in 1775, employed by Earl *Edward* again to inquire whether she knew and recollected of the said will of 1746 ; that witness accordingly saw her, and made the same inquiries as he had before, and she gave him the like information as he had received from her on the former occasion, and he reduced it into writing, and read over the same to her, and settled it with her, and she having approved of it, witness had two copies of it made, and attended her with them on the following day ; and she held one of them in her hand while he read the other, and after she approved of them, they were both signed by her in witness's presence, and witness transmitted them to the Earl. Witness then proved one of such copies, and his own memorandum and signature at the foot of it.

(*d*) See pp. 279, 280, *ante*.

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John Verner proved the case laid before Mr. *Yorke*, and Mr. *Yorke's* signature to it. *Charles Tarrant* and *Nathan Drake* stated that Mrs. *Riddick* died in *December* 1789, and they believed she was a person of veracity.

The two causes were set down for hearing in 1784, but in 1785 a formal decree was made by consent of both parties, dismissing both bills, without costs.

During the preceding litigation, and at the time of the dismissal of the suits, the Earl had a second son, *Henry King*, who died without issue in *July* 1785. From the dismissal of the suits, the Earl remained in undisputed possession of the family estate in the county of *Roscommon*, up to the time of his death in *November* 1797, and by his will dated *June* in that year, he devised all his real estate (including the reversion in fee in the lands now claimed by Lord *Lorton* and Mr. *Robert King*, expectant on the death and failure of issue male of his brother *Henry*, which he was then entitled to, if his elder brother Lord *Kingsborough* died intestate) unto his brother *Henry*, and *James Stewart* in fee, in trust, after raising certain sums of money therein mentioned, to convey the same to his son, Viscount *Kingsborough*, in fee.

Viscount *Kingsborough* (who upon his father's death became second Earl of *Kingston*), by his will dated *January* 1798, devised all his real estates to *Thomas Bishop* of *Cork* and his heirs, to the use of his second son, Lord *Lorton*, for his life, with remainder to his first and other sons severally and successively in tail male, and died in *April* 1799. And *Robert King*, party to these appeals, Lord *Lorton's* eldest son, born some few years afterwards, became first tenant in tail under that devise.

Henry King, the tenant for life, under the Act of Parliament, of the lands now in question, and one of

the devisees and trustees in the will of the first Earl of *Kingston*, survived his co-trustee, *James Stewart*, and died without issue and intestate as to the said trust estate in *February* 1821, leaving *George*, third Earl of *Kingston*, his heir-at-law, who in that character became entitled to the legal estate, if the same passed to the said devisees in trust under the will of *Edward*, the first Earl. And on *Henry's* death, the Earl entered into possession of all the lands which *Henry* had enjoyed under the Act, and afterwards sold some of them, and was about to dispose of those now claimed, when Lord *Lorton* became apprised of his and his son's title thereto as derived under the will of *Robert*, the second Earl of *Kingston*, who (as they were advised) became entitled as devisee in fee of *Edward*, the first Earl, who became entitled as heir-at-law of his deceased elder brother, Lord *Kingsborough*.

Lord *Lorton*, in *June* 1827, filed his bill in these causes against *George*, Earl of *Kingston*, which was afterwards amended by making the Honourable *Robert King* a co-plaintiff, and by adding other parties deduced the title of the plaintiffs to the first class of lands through the settlements of 1689, 1722, and 1724, and the intestacy of Lord *Kingsborough*, and the wills of the first and second Earls of *Kingston*; and to the second class, through the two first of those settlements and the same intestacy and wills; and the bill charged that the legal estate was outstanding under the Act of Parliament of 1762, the first Earl's will, &c., and prayed that the plaintiffs might be declared entitled to the said lands according to the devises or limitations in the will of *Robert*, the second Earl of *Kingston*, and that the defendant *George*, Earl of *Kingston*, might be decreed to give up possession, and with all other necessary parties be directed to execute proper conveyances.

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The Earl of *Kingston* put in his answer in *November* 1828, and thereby insisted that Sir *Henry King* had power to devise both the said classes of lands, and that he, the defendant, became entitled thereto on the death of *Henry King* in 1821, as heir male of the body of the second Earl, under the limitations in the will and codicil of Sir *Henry*; that Sir *Henry* acquired the fee in the first class as heir of his brother *Robert*, or under some appointment executed by *Robert* pursuant to the power reserved to him in the settlement of 1724; and in the second class by purchase from the trustees for sale under the settlement of 1722. And the defendant further insisted by his answer, that even if Sir *Henry* had not any right to devise said lands, yet that as *Robert*, Lord *Kingsborough*, had taken benefits under his father's will, he was not entitled to make any claims inconsistent with its provisions; and if he were not so bound, Sir *Edward* on his death was bound to elect, and he did elect to abide by the dispositions of the said will, and he availed himself of the large benefits he took under the will, for the purpose of procuring the compromise with his brother in 1761. He also in his answer stated, that he had lately discovered that Lord *Kingsborough*, in 1746, made a will duly attested, being the will referred to in the saving clause of the Act of 1762, whereby all the real estate was limited to Sir *Edward* for life; and he insisted that if Sir *Henry* had no power to devise the lands in question, and Lord *Kingsborough* was seised in fee, then that he, the defendant, was entitled under such will as heir male of Sir *Edward*; and in support of such title, the answer referred to the amended bill filed by Viscount *Kingsborough* against his father, Earl *Edward*, in 1781, and the Earl's answer thereto, and the Viscount's answer of *June* 1781 to the Earl's bill. The answer

also referred to Sir *Edward's* said answers, filed 1756 and 1758, and to the bills of *Henry King*, filed in the same years.

In 1829, the plaintiffs further amended their bill, and put in issue all the equity pleadings and proceedings hereinbefore stated; and the defendant, in his answer to that bill, amongst other things, referred to the said equity pleadings and proceedings, as evidencing the matters in that behalf in the answer mentioned.

In *September* 1829, the Earl of *Kingston*, filed a cross-bill against Lord *Lorton* and his son *Robert King*, for a discovery of documents, &c., charging, among other things, that Lord *Lorton* had got into his possession or power the said will of 1746, or a duplicate or copy, or an abstract therefrom; and further charging that the only testamentary paper of Lord *Kingsborough* ever sought to be established, or alleged to have been executed subsequent to the will of 1746, was declared by a jury to be a forgery, and consequently insufficient to revoke the will of 1746.

The plaintiffs in the original cause, in their answer to the cross-bill, stated, amongst other things, that Lord *Lorton* had in his possession two paper writings purporting to be copies of the wills of 1746 and 1752, which papers were found in 1829 at Mr. *Hamilton's* house in *Dublin*; and they denied having or ever having had in their possession or power the will of 1746, or any duplicate thereof.

Evidence was gone into in the original and cross cause, and on the part of Lord *Lorton* and his son, Mr. *Fox*, their solicitor, and other witnesses stated that they had made diligent search in the places where there was any probability of finding the alleged will of 1746, and they had not been able to discover

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it, or any copy of it, except the copy before mentioned in the answer.

On the part of the Earl of *Kingston*, *Bernard Higgins* deposed that he lately searched for and found the part of the will of 1746, now extant, amongst the papers of the late *Thomas Kemmis*, who, as the witness stated, had been the law-agent and solicitor of *Edward Earl of Kingston*.

The causes were heard for several days before the Lord Chancellor of *Ireland*, in *March* 1831, and the plaintiffs read, amongst other documents, the bill filed by *Henry King* in *June* 1755; the answers of Sir *Edward King* thereto; *Mark Whyte's* answer, filed *April* 1757; Sir *Edward's* second bill; *Whyte's* answer; *Henry King's* third bill; Sir *Edward's* answer thereto; the deed of compromise of 1761, and the Act of Parliament of 1762; Earl *Edward's* answer, filed *June* 1781; the Earl's cross bill, filed 1781, Viscount *Kingsborough's* answer thereto; the Earl's answer, filed *January* 1782; the depositions of *Holt Waring*, *James Glascock*, *John Wallis*, *William French*, *Hugh Hammersley*, and other witnesses, in the cross cause of *Kingston v. Kingsborough*, and the decree of dismissal in that and the original cause. On behalf of the Earl of *Kingston* were read, amongst other things, the bills filed by *Henry King*, *November* 1756, and *April* 1758, and the answers of Sir *Edward* thereto; the said answer of *Mark Whyte*, filed *February* 1758, and the said deed of compromise and Act of Parliament; the bill filed by Viscount *Kingsborough*, *January* 1781, and the answer of Earl *Edward* thereto; the cross bill filed by Earl *Edward* against Viscount *Kingsborough*, *February* 1781, and the Viscount's answers, and the said decree of dismissal; and the depositions of some witnesses in that cause, and of *Bernard Higgins* in this cause.

The *Lord Chancellor*, after hearing the arguments of counsel at great length, and having taken time to consider the case, delivered his opinion in favour of *Lord Lorton*, on the disputed questions relative to the power of *Sir Henry King* to devise the said lands and the seisin in fee of *Robert*, *Lord Kingsborough*, and in favour of his title generally, as made by his bill, in case it should appear that *Lord Kingsborough* died intestate, upon which point his Lordship, by a decree dated the 20th of *May* 1831, directed an issue to be tried in the Court of *King's Bench* in *Ireland*, by a special jury of the county of *Dublin*, between *Lord Kingston* as plaintiff, and *Lord Lorton* as defendant, upon the question, "Whether the said *Lord Kingsborough* died intestate as to his freehold estate or not, and if not, by what testamentary instrument he disposed of the same?" And it was further ordered, that the parties should be at liberty to read on the trial all the proofs and evidences read in those causes on the hearing in Chancery.

The issue was tried at the bar of the Court of *King's Bench* before the four Judges and a special jury of the county of *Dublin*. The evidence adduced by the plaintiff in the issue, consisted, among other things, of the deposition of *Bernard Higgins* in these causes as to the finding of the counterpart of the will of 1746, and the deposition of *Arthur Maguire* in the cause of *Kingston v. Kingsborough*, and the contrary; the said part of the will of 1746; the settlements of 1722 and 1724; the will and codicil of *Sir Henry King*; the recoveries suffered by *Lord Kingsborough* in 1746; the deed of compromise of 1761; the Act of 1762; the answers of *Viscount Kingsborough* in 1781 and 1782; administration with the will of 1752 annexed; reco-

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veries suffered in 1776; and the case laid before Mr. *Tisdale*, with his opinion thereon.

The evidence for Lord *Lorton*, the defendant in the issue, consisted of the depositions of Mr. *Wallis* and *Holt Waring*; *Mark Whyte's* answer of February 1758; Mr. *Glascok's* depositions in *Kingston v. Kingsborough*; certain deeds executed upon the marriages of Lord *Kingsborough's* sisters in 1750 and 1751; Sir *Edward King's* answer of the 4th July 1755; Mr. *Hammersley's* and *Nathan Drake's* depositions(e) in *Kingston v. Kingsborough*; the judgment in ejectment; the answer of Viscount *Kingsborough* of June 1781; the answer of Earl *Edward*, filed 4th June 1781; orders made in *Kingsborough v. Kingston*, and the contrary, 1783 and 1784; the decree of dismissal in those causes; the depositions of *William French*, *Gilbert King*, *Holt Waring*, *Charles Tarrant*, and of Mr. *Wallis*, to certain interrogatories in *Kingston v. Kingsborough*.

Lord *Lorton's* counsel also examined Mr. *William Kemmis*, who stated that his father, *Thomas Kemmis*, was attorney to *Robert*, Earl of *Kingston*, and that his mother was daughter of *Mark Whyte*; that his father had papers in *Kingston v. Kingsborough*, and the contrary, and had got *Whyte's* papers; that witness gave Earl *Kingston's* attorney liberty to search for papers in his office, and that that gentleman took away some papers and an old will. Mr. *Fox*, also examined as to the searches made by him for papers, stated he had been unable to find the case laid before Mr. *Yorke*, or

(e) *Hammersley's* depositions as to Mrs. *Riddick's* declaration had been objected to on the part of the Earl of *Kingston*, but the Court permitted them to be read in obedience to the order directing the issue.

the original of Mrs. *Riddick's* declaration. The case laid before Mr. *Tisdale*, and the answer of Viscount *Kingsborough*, filed May 1782, setting out the letter of Earl *Edward*, dated the 28th *February* 1775, were read for Lord *Lorton*. In reply, the counsel for the Earl of *Kingston* called Mr. *Jones*, an attorney, who stated that, in *March* 1830, he searched among Mr. *Kemmis's* papers for an old lease, which he wanted as attorney for Colonel *King*, and saw there the original will of 1746 (the counter-part produced in evidence), and on his cross-examination he stated there were other old papers and documents in the same place. Mr. *Franks*, the solicitor of the Earl of *Kingston*, stated that he got some papers from Mr. *Kemmis*, found upon a second search in *May* 1830, and amongst them was the counterpart of the will of 1746. *Edward's* answer of *February* 1758 was read for both parties.

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The Lord Chief Justice, in his charge to the jury, left the question of cancellation to them in two ways: first, with reference to the declarations of Mrs. *Riddick*, as proved by Mr. *Hammersley's* depositions; and, secondly, on the facts and circumstances of the case, independent of those declarations; and commented on the law applicable to the case; and told the jury, as they were retiring to consider their verdict, in case they should find a verdict for the defendant, to inform the Court whether they acted on *Hammersley's* depositions as to Mrs. *Riddick's* declaration. The other judges concurred with his Lordship's directions, which were not objected to by either party. The jury found a general verdict for the defendant, thereby declaring the intestacy of Lord *Kingsborough*. They added, in answer to a question from the Court, that "they had taken Mrs. *Riddick's* statement into their con-

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sideration, and they found the will of 1746 had been cancelled, because the uses of it had been satisfied."

An application was made soon afterwards in behalf of the Earl of *Kingston*, to the Lord Chancellor, to set aside the verdict, as having been had against law and evidence, and contrary to the charge of the Chief Justice, and by the admission of illegal evidence, and to direct a new trial. By an order of the 14th of *May* 1832, the Lord Chancellor ordered that the verdict should be set aside, and that the parties should proceed to a new trial of the said issue; and that the same should be tried at the bar of the Court of *King's Bench* by a jury of the county of *Sligo*.

The appeal by Lord Viscount *Lorton*, and his son *Robert King*, is against that order. And the cross-appeal by the Earl of *Kingston*, lodged subsequently, is against the decretal order of the 20th of *May* 1831, more especially against so much of it, and also so much of the order of the 14th of *May* 1832, as directed that the parties should be at liberty to read on the trial of the issue *all* the proofs and evidence read on the hearing of the cause in Chancery.

Dr. *Lushington* and Mr. *Knight* (with whom was Mr. *Parry*) for Lord *Lorton* and Mr. *King*:—The principal question in the first appeal is, whether the will executed by Lord *Kingsborough* in 1746 is operative, or revoked? The Court of Chancery might have decided that question upon the unobjectionable evidence in the cause. The Lord Chancellor of Ireland, instead of applying his own judgment to that evidence, directed an issue, which was tried by a most intelligent jury, and a verdict was found according to law and to the clear balance of evidence, which was sufficient to establish the cancellation of the will,

without looking at all to the evidence, the admissibility of which was so much disputed on the motion for the new trial. It appears from the Lord Chief Justice's report of the trial—which was at bar and continued for eight days—that a vast mass of documents was produced, part of which was rejected, and that after the case was closed on both sides, the Chief Justice, in his summing up, left these questions to the jury, “Whether the testator revoked the will of 1746, by cancelling one counterpart, with an intention to revoke his will?” and told them that “the act of cancellation alone was, in such a case, not sufficient, unless accompanied by an intention to revoke.” As to the fact of cancellation, he left it to them in two ways: first, with a reference to the declarations of Mrs. *Riddick*, as proved by Mr. *Hammersley*; and secondly, on the facts and circumstances of the case, independent of those declarations. He told them that “if they believed, as was alleged by the defendant in the issue, that the testator had a part of the will in his possession, that he had not given it to any person, and that it was not in his possession at his death, a presumption would arise that he had cancelled that part of his will, which presumption it lay upon the plaintiff to rebut; and that if they believed that the testator had done so, it must be presumed that he did so with an intention unconditionally to revoke his will, unless that presumption also should be rebutted by the plaintiff; and that if they should so believe, it was a revocation of his will, although the other counterpart remained uncanceled.” He then told the jury that “the plaintiff might rebut that presumption by evidence of facts and circumstances inconsistent with such an intention of the testator, or by showing that he intended that the cancellation should not be a re-

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vocation of his will, unless in the event of a will theretofore executed, or a distinct will then in his contemplation thereafter to be completed, being sufficient to pass his real and freehold estates;" telling them that "a general indefinite intention in the testator's mind to make some other will at some future time, would not be sufficient to rebut the presumption of an intention to revoke, arising from the cancellation of one counterpart." He then recapitulated the evidence of facts and circumstances, upon which the plaintiff had relied as tending to rebut the presumption of an unconditional intention to revoke, and left it to them to say whether there were any circumstances from which they could infer that the testator intended that his cancellation of the counterpart should not operate as a revocation, unless in such events as his Lordship had pointed out. The other Judges concurred in these directions, which were not objected to by either party.

There is no ground to object to the learned Judge's directions, for it is a well-established doctrine, that if a will be executed in duplicate, and there is proof that one part, kept by the testator, was destroyed by him, or was not found among his papers after his death, the presumption is that he cancelled that will: *Colvin v. Fraser* (*f*), *Loxley v. Jackson* (*g*), *Wilson Wilson* (*h*), *Davis v. Davis* (*i*). That presumption may be rebutted by evidence of circumstances leading to a contrary conclusion, but the *onus* of producing such evidence lies in the party setting up the will. *Henry King*, who claimed under the will of 1752, which was set aside on the trial of Sir *Edward's* ejectment, would have the same interests under the

(*f*). 2 Hagg. 226; see p. 326.

(*g*) 3 Philli. 126.

(*h*) 3 Philli. 545; see p. 552.

(*i*) 2 Addam. 226.

will of 1746, but he did not set up or produce this will, although he had the custody of all the testator's papers. The rational conclusion is, that it was not among the papers, and therefore that it was destroyed. The next presumption of law is, that under the circumstances proved, Lord *Kingsborough*, by destroying the one part of this will, cancelled it *animo revocandi*. *Pemberton v. Pemberton* (k), *Onions v. Tyrer* (l), *Limbrey v. Mason* (m), *Burtenshaw v. Gilbert* (n). The case of *Colvin v. Fraser*, before referred to, shows that if a duplicate of a will remains in the possession of a third person, still the destruction of the original by the testator is sufficient to destroy the effect of the whole will. And that doctrine is supported by the case of *Moore v. Moore* (o), which is also of importance as showing the view taken by the Judges in the Court of Delegates of the case of *Goodright*, dem. *Glazier v. Glazier* (p). The presumption that Lord *Kingsborough* cancelled the part of this will, which was in his own possession, *animo revocandi*, stands wholly unrebuted, and, therefore, upon the authorities referred to, the other part, with whomsoever deposited, was cancelled in effect, and the whole will was revoked. *Mark Whyte*, in his answer to the bill filed by Sir *Edward King* in 1758, said he returned the counterpart of this will to Lord *Kingsborough*, and got it back for a precedent to draw another will in 1747. That fact, instead of rebutting the presumptions of law, only tends to support them. But suppose the will of 1746 was not destroyed until after the cancellation of the will of 1747, it may be said,

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(k) 13 Ves. 290; see p. 308.

(l) 1 P. Wms. 346.

(m) 4 Burr. 2515, and Comyn,
 451.

(n) Cowp. 49.

(o) 1 Philli. 375; see p. 401.

(p) 4 Burr. 2512.

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on the authority of *Glazier v. Glazier*, that the cancellation of the latter had the effect of setting up the will of 1746. But the subsequent will of 1752, though proved not to have been duly executed, is sufficient proof of the testator's intention to revoke the will of 1746, for the devises in the will of 1752 are quite different from the will of 1746. The delivery of the counterpart of that will to *Mark Whyte* was merely to serve as instructions for a new will, to be drawn in the same way, except that one brother was to be substituted for the other.

This view of the case is not only consistent with, but is supported by, the answer of *Mark Whyte*, who was the agent and confidential solicitor of Lord *Kingsborough*, and also of *Henry King*, and who, therefore, on failure of the will of 1752, was interested in supporting the will of 1746. The declaration of Mrs. *Riddick* that she burnt this will by Lord *Kingsborough's* directions would be conclusive. But the admission of that declaration in evidence on the trial was objected to successfully. To *Hammersley's* depositions respecting that declaration no objection was taken by Lord *Kingston* in the Court of Chancery; he is therefore bound to admit them in all subsequent stages of the suit, and by the same rule he has no right to object to the admission of any of the pleadings in the suits between Sir *Edward* and *Henry King*, and Earl *Edward* and Viscount *Kingsborough*. The Earl and Viscount were well aware of all the circumstances relating to this will; they both had seen Mrs. *Riddick's* declaration, had full means of ascertaining its correctness, and they acted upon it in putting an end to the suit in 1785. The Earl of *Kingston*, who claims through them, is bound by their acts. Though the declaration was

not read by itself at the trial, Mr. *Hammersley's* depositions containing it were read, and it cannot be denied that they had some influence on the minds of the jury. In truth, neither the declaration nor the depositions were necessary, for the other evidence, to which no objection could be taken, would have fully justified the verdict. Objections may be taken to verdicts on issues from a court of equity on three grounds: First, misdirection of the judge; secondly, rejection of evidence, neither of which objections was taken here; and thirdly, admission of evidence, which was the ground of the objections taken. But the object of directing issues, is to inform the conscience of the judge in equity, who upon receiving the verdict of the jury, takes the whole of the evidence, both in the cause and before the jury, into his consideration, and declares whether the verdict does or does not satisfy his conscience. It has been repeatedly decided, that if, on the trial of an issue, evidence, which ought to be received, has been rejected, or evidence, which ought to be rejected, has been admitted, though in such cases, courts of law would grant new trials, the judge who directed the issue would not, if he was satisfied that the verdict ought not to be different, had the rejected evidence been received, or had the evidence, improperly admitted, been rejected. *The Warden of St. Paul's v. Morris* (*q*). *Barker v. Ray* (*r*), and *Bullen v. Mitchel* (*s*). Lord *Redesdale* there says (*t*), "But supposing the objection to the admission of the entries in this book to be well-founded, what is to be done on the application for a new trial? The design of the trial is to inform the conscience of the Court, and any special matter ought

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(*q*) 9 Ves. 155; *see* 165 *et seq.*
 (*r*) 2 Russ. 63; *see* 75.

(*s*) 4 Dow. 297.
 (*t*) *Id.* 326.

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to be indorsed on the *postea*. It is not a verdict to be put on record for judgment, for none is given upon it, but it is to inform the conscience of the Court, and that is the right way of considering it. Then when I look at what the other evidence is, it appears to me amply sufficient to warrant the verdict." And further on, in the same case, Lord *Eldon* says "Though evidence has been rejected, which ought to have been received, yet, if you are satisfied on all the evidence, that if that evidence which was rejected had been admitted, the verdict ought still to have been the same, you ought not to send the matter to another trial." In this way, both their Lordships made the court from which the issue proceeded the tribunal to decide on the sufficiency as well as the admissibility of the evidence. In *Boote v. Blundell* (*u*) the point is put still more strongly and clearly by Lord *Eldon*, saying (*v*), "In case of miscarriage upon the trial of an issue, by improperly rejecting evidence, this court, if satisfied that, had that evidence been received, the verdict ought to have been the same, would not grant a new trial, being to form its judgment both upon that evidence and what appears on the record." If, therefore, this evidence was properly required by a court of equity, and was received there, the admission of it on a trial instituted solely for the purpose of informing the conscience of a court of equity could not be erroneous.

This is a peculiar case, depending almost entirely on written instruments and pleadings in equity, a species of evidence least of all fit for a jury. Considering the lapse of time since the death of the alleged testator, the production and the abandonment

(*u*) 19 Ves. 494.

(*v*) *Id.* p. 503.

of the alleged will in 1757 and 1760, the family arrangement in 1760, confirmed by Act of Parliament, the second litigation by the tenant in tail, under the same will in 1781, for the purpose of establishing it, the dismissal of his bill with his consent in 1785, and the subsequent acquiescence in the title derived *dehors* that will, no judge of a court of equity, considering all these circumstances, and also the expenses to which Lord *Lorton* has been put, and the injustice of keeping him longer out of possession of the property to which he has been declared entitled, subject only to the question on this will already decided in his favour, ought to direct a new trial of that question, especially when the law is so clear against the validity of the will, without referring to the evidence that was objected to. The only ground for granting the issue at first, was, that Lord *Kingston*, being the heir at law was entitled to it upon the principles of courts of equity. The grounds on which such issues are granted, and on which also new trials of them may be refused, are laid down in *Whyte v. Wilson* (x). [Lord *Plunket*: This was not an issue granted to the heir at law as heir at law, but to a person who, though heir at law, claimed as issue in tail under the will.]—It was not competent to Lord *Kingston* to set up that will after what passed at the termination of the former suits between the parties, from whom he claims. This will was not thought of from 1785, until it was discovered among some old papers in 1830, three years after Lord *Lorton*'s bill was filed. He had been opposed to the issue from the beginning, and intended to appeal against it. He submitted only in hopes that the verdict would put an end to litigation. He

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(x) 13 Ves. 87.

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afterwards confined his appeal to the order for a new trial, and it was not until after his appeal was presented, that Lord *Kingston* appealed from so much of the original decree as was declaratory of Lord *Lorton's* rights, and also from so much of that decree, and of the order for the new trial of the issue, as directed the proofs and evidences in the cause to be read at the trial without any qualification. The qualification and exception to evidence, suggested by the cross appeal, applied not only to Mrs. *Riddick's* declaration and Mr. *Hammersley's* depositions, but also to the pleadings in the suit between Earl *Edward* and Viscount *Kingsborough*. The statements and admissions contained in the pleadings, do not bar or estop Lord *Lorton* from denying the validity of the will. There is a distinction between an admission and an estoppel,—the latter is conclusively binding; a receipt is an admission, but it is not conclusive: *Shaife v. Jackson*(y), *Sampson v. Cooke*(z). Viscount *Kingsborough's* bill, in 1781, proceeded on the ground that he was deceived in joining his father in suffering recoveries upon his father's representation, that his consent was only matter of form to clear the title, which was good without it, because the will of 1746 was void, whereas he had afterwards discovered that the will was valid, and that his father had only a life estate before the recoveries were suffered. It is clear that the bill was founded on a misconception of title. The Viscount was in fact only the heir apparent of one who had the fee simple of the estate. To support the argument on the other side, it must be shewn that he was tenant in tail. At the utmost he was only issue in tail. Now what the tenant in tail does binds the

(y) 3 Barn. & C. 421.

(z) 5 Barn. & Ald. 606.

issue in tail, and in such a case an adjudication against the tenant in tail binds the issue in tail, and is pleadable accordingly; *Lloyd v. Johns* (a), *Westmeath v. Westmeath* (b), and *Roe dem Brune v. Rawlings* (c); for here there was an adjudication of the very point now brought into discussion, and by that adjudication, the tenant in tail was bound. It is admitted, that what a man says before he comes into possession, does not bind him afterwards. But what he does when in possession, will have that effect. An analogous case in point of principle has been decided in the Court of Common Pleas, with respect to the rights of assignees in bankruptcy, where evidence of what the man had said and done before he became assignee, was rejected by the Court as incompetent to bind him when he had assumed that character. It is therefore plain, that all that Viscount *Kingsborough* said and did before he came into possession, cannot now be used against him, because he was then only the heir apparent of a man in possession. If, therefore, it was proper to direct the issue at all, the direction that the parties should be at liberty to read at the trial the proofs and evidences read at the hearing, was fully justified by the circumstances of the case, and by the principles and practice of courts of equity. Some of the evidence objected to by Lord *Kingston* in his appeal, having been read for himself in the trial, in pursuance of the order directing the issue, he ought not now, after failing in the trial, be heard to complain of that.

The reasons annexed to the cross appeal suggest a case of election between Lord *Kingsborough* and Sir *Edward* and *Henry King*, in case Sir *Henry King* had

(a) 9 Ves. 55 *et seq.*

(b) 3 Madd. 436.

(c) 7 East, 279.

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no power to dispose of these estates by his will. No point of that sort could arise between the parties to these appeals; Lord *Kingsborough* took nothing under that will; he had a paramount title. Upon the death of *Henry King*, in 1821, Lord *Kingston*, as his heir at law, entered into possession of these estates. His younger brother, Lord *Lorton*, claimed to be beneficially entitled to them under his father's will, and he filed his bill against Lord *Kingston* for a conveyance. Lord *Kingston* filed his cross bill, claiming to be entitled to the estates as tenant in tail under the will of Sir *Henry King*, or the will of Lord *Kingsborough*, dated 1746. Lord *Lorton* put his case thus: no estate tail is in existence under the will and codicil of Sir *Henry King*, and Lord *Kingsborough's* will was clearly revoked; at all events it cannot be enforced by Lord *Kingston*, having been abandoned by his father, the first tenant in tail, whose interest and title under it were the same which Lord *Kingston* claims. Sir *Henry King* having no power to dispose of the estates, they devolved on his eldest son *Robert*, afterwards Lord *Kingsborough*, under the former settlements, and he having, in 1746, barred the entail, settled the estates to the ultimate uses of his right heirs, and upon his death without issue in 1755 his next brother and heir, Sir *Edward*, first Earl *Kingston*, became entitled, and devised the estates to his son, Viscount *Kingsborough*, who by his will devised them to the use of his second son, Lord *Lorton*.

Mr. *Pemberton* and Mr. *Jacob* for Lord *Kingston*.—There are three objections to the decree. First, the bill ought to have been dismissed without directing any issue. But, secondly, if any issue was necessary, then it is clear that it should not have been such an

issue as was framed in this case, but ought to have been one which would have prevented Lord *Kingston* from setting up the legal estate. And, lastly, if any issue was necessary, there ought not to have been any direction as to the evidence, but the case ought to have gone before the court of law in the ordinary manner. If these three objections to the original decree cannot be maintained, and if the House should be of opinion that an issue was properly directed, then arises the question, whether there ought not to be a new trial.

In the first place, there ought not to have been any issue at all. The court of equity had before it sufficient circumstances on which to found a decision. By the compromise of 1761, and the Act of Parliament of 1762, the estates were fully disposed of to the uses of the will of Sir *Henry King*. The seisin in fee of the settlor in 1689 is not disputed. Indeed Lord *Kingston's* title is founded upon it. The destruction of the contingent remainders contained in the settlement of 1689 was not a breach of trust(e). That settlement created charges upon certain lands. Those lands are the subject of the subsequent settlement of 1722, and by that settlement are discharged from the charges created and imposed on them by the former settlement, some of the lands themselves being given in lieu of those very charges. From the proofs in the cause it is sufficiently clear, that Sir *Henry King* was seised of these estates in fee, and that by his will and codicil he created an estate in tail male in them, under which the present Earl of *Kingston* became entitled to the estates as heir male of his grandfather, Earl *Edward*. But if it were doubtful whether Sir *Henry King* had power to dispose of these estates, yet having in fact assumed the right to do so, and his sons,

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(e) *Sed vide Mansell v. Mansell*, 2 P. Wms. 678.

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Lord *Kingsborough* and *Edward*, having taken beneficial interests under his will, it is not competent for Lord *Lorton*, claiming as a volunteer under them, to dispute the title of Lord *Kingston* claiming an estate tail under that will. By the agreement of 1761, and the Act of Parliament, *Henry King*, youngest son of Sir *Henry*, was to have these estates under such limitations, with such powers and with such remainders as were appointed concerning them by Sir *Henry's* will, whether he had or had not power to devise them. Lord *Lorton* therefore deriving title from Earl *Edward*, who was a party to the agreement, ought not to be allowed to dispute Lord *Kingston's* title claiming under that will.

It is said that a case of election cannot be raised against Lord *Kingsborough* under Sir *Henry King's* will, for that he took nothing under it. That argument cannot be maintained, for in point of fact, Lord *Kingsborough* came in under the will by way of remainder, and had therefore a sufficient interest to put him to an election. The agreement and the Act of Parliament are conclusive as to the estates mentioned in that will, and the first was made for the express purpose of giving effect to it. So far therefore as the acts of the parties are concerned that will is established. Then comes the Act of Parliament, which was passed for the sole purpose of making the agreement effectual, and consequently there are two most important matters which go directly to the establishment of the will of Sir *Henry King*. It is true that there is in the Act a limitation contained in these words, "So far as the said Sir *Henry King* had power to devise the same;" but those words relate only to his lawful authority to do an act, and do not refer to the question whether he did the act or not, or whether he at-

tempted to do it. Besides, those words apply to the leasehold, not to the freehold, premises. But if there are ambiguous expressions in either the deed or the Act of Parliament, this House will so construe them as to give effect to that which was plainly the intention of both. Sir *Henry* had professed by his will to devise his freehold and leasehold estates in the same manner. By the law he was not able to do so. Yet his intention was respected, and the agreement declared that his devise should be held good. The Act too declared the same thing.

With respect to Lord *Kingsborough's* will of 1748, it may be admitted that the general doctrine of law is, that if a man has made duplicate copies of a will, and destroys one of them which is in his possession, and does it *animo revocandi*, the other copy, which is not in his possession, will be cancelled. But then the *animus* of the act is not conclusively shown by the destruction of the one part. At the very moment he may repent of what he has done, and while the flames are consuming one copy, he may desire to rescue it. If then he leaves the other copy in the hands of the person with whom it has been entrusted, and does not attempt to obtain possession of it, and destroy it, nor give any orders for its destruction, he thereby shows that the burning of the one part was but the hasty act of the moment, and was not even a part execution of a settled purpose of revocation. The mere act of cancelling a will is no revocation, unless done *animo revocandi*: *Burtenshaw v. Gilbert* (d). The question of the intention of the testator is a matter of fact to be determined by the acts which he did, and the circumstances under the influence of which he was at the moment acting. Here the testator allowed the

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(d) Cowp. 49; see p. 52.

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will to remain for a long time in the possession of *Mark Whyte*, then had it from him, and then returned it to him as a precedent by which to prepare another will. Without therefore impeaching Mrs. *Riddick's* character, without even supposing her to have been mistaken as to any of the facts to which she spoke, it may be contended that those facts themselves amount only to a hasty expression of an intention which was never seriously entertained, and at all events was never deliberately acted on. In that case the cancellation is not complete: *Doe d. Perkes v. Perkes(e)*. But the declaration of Mrs. *Riddick*, under the circumstances in which it was obtained, being called on to speak of what happened many years before, not upon oath, nor subject to cross-examination, and not knowing whether she was speaking of the will of 1746 or that of 1747, was improperly received in evidence on the trial of this issue. The facts stated by her were at most but hearsay evidence, deposed to by Mr. *Hammersley*, and it is impossible to say that hearsay representations ought to be laid before a jury; and if such representations are improperly admitted, then as the effect of them on the minds of the jury cannot be estimated, there ought to be a new trial, in order to let a jury decide on the facts of the case, independently of such testimony. It is probable that the Court might refuse a new trial in a case where it was doubtful whether testimony improperly admitted could have produced any effect upon the jury; but here the testimony was directly bearing on the point immediately at issue between the parties, and its admission must have affected in the most material manner the great question in the cause. It was admitted that the jury were influenced by this evidence.

(e) 3 Barn. & Ald. 489.

It may be true that the object of an issue is not to decide the cause but to inform the conscience of the Court by which the cause is to be decided. But though not bound by the opinion of a jury, the Court of Chancery is influenced by that opinion; and if such opinion is obtained upon evidence that ought never to have been laid before a jury, the conscience of the Court will not be properly informed, and the very object of granting the issue will be defeated.

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It is not true that a party who does not object to the admission of evidence at the hearing is precluded from objecting to the same evidence when tendered to a jury on the trial of an issue. The daily practice of the courts of equity is an answer to such an argument. The statements of parties are considered by the Judge in equity in the light of evidence, on which he founds his decision; but if, after examining the case, he is not satisfied with the proof of some of the facts, and thinks fit to direct an issue, either party is at liberty, on the trial of that issue, to object to evidence not ordinarily admissible in a court of law; and this right of objection is so completely recognised by courts of equity, that if the Judge in equity thinks that such evidence should be laid before a jury, he makes a special order for that purpose. If the argument on the other side was well founded, such an order would be at all times unnecessary. Lord *Lorton* claims as volunteer under the will of his father, who, in his answer to Earl *Edward's* bill in 1781, after being fully informed of all the circumstances relating to the cancellation of the will now relied on by Lord *Lorton*, declared on oath his belief that that was a subsisting will on the death of the testator, Lord *Kingsborough*. That answer, which was

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read at the trial, ought to have satisfied the jury that the fact was as therein stated, and that the will was never revoked. That answer ought, at all events, be held as an estoppel against Lord *Lorton's* denial of the validity of the will.

Among the cases cited, besides those before mentioned, were the following—*Palmer v. Lord Aylesbury*, 15 Ves. 176 and 299, *Andrews v. Palmer* and *Corbett v. Corbett*, 1 Ves. & B. 21 and 335, and *Gordon v. Gordon*, 1 Swanst. 166, as to the reading of the depositions on the trial of an issue; *Tatham v. Wright*, 2 Myl. & K. 1, as to new trials of issues; *Ex parte the Earl of Ilchester*, 7 Ves. 362 *et seq.* as to the revocation of wills.

Jan. 23, 1838. The *Lord Chancellor* :—These appeals were argued at your Lordships' bar a considerable time since. The facts were so complicated and the period so long during which it was necessary to examine the numerous transactions respecting the property in question, that I felt that I should not be justified in attempting to come to any conclusion as to what course it would be proper for your Lordships to follow until I had an opportunity of devoting my undivided attention to the subject for a considerable time together. That opportunity I have now had, and notwithstanding the difficulties of the case, I do not expect that your Lordships will entertain much doubt as to the judgment to be pronounced. It would occupy too much of your Lordships' time to enter into any detailed narrative of the facts which have given rise to the present litigation, nor can it be necessary, as they are fully stated in the printed papers on your Lordships' table. I propose, therefore, to confine myself to such of the matters as it may be necessary to state, in order

to make intelligible the observations which I propose to submit to your Lordships.

Lord *Lorton's* case is, that his grandfather, *Edward*, first Earl of *Kingston*, was seised in fee of the estates in question; that he by his will devised those estates to trustees, of whom his brother, *Henry*, was the survivor, in trust for his son *Robert*, the late Earl of *Kingston*, and that that *Robert* by his will devised these estates for the benefit of his second son, Lord *Lorton*, and his family. He, therefore, calls upon Lord *Kingston*, as the heir of *Henry King*, the surviving trustee, to convey the legal estate for the benefit of those entitled. To this claim Lord *Kingston* says, that it is not true that Earl *Edward*, Lord *Lorton's*, and Lord *Kingston's* grandfather, was seised in fee of those estates; that his claim to them was as heir to *Robert*, (Lord *Kingsborough*,) but that this *Robert*, if he was so seised of the estates, made a will in 1746, by which he made his brother, *Edward*, tenant for life, with a remainder under which he, Lord *Kingston*, is now entitled; but that in fact *Robert* was not seised of these estates, but that they had been otherwise settled by previous settlement, and a will of Sir *Henry King*, the father of that *Robert* and of *Edward*. The questions, therefore, are, *first*, whether *Robert* was seised in fee of those estates; *secondly*, if he was so seised, whether his brother *Edward* succeeded to them as his heir, or *Robert* disposed of them by the will of 1746. To come to a safe conclusion upon the first of these points, it will be necessary shortly to consider the early history of the title to these estates. To avoid the repetition of names, the property was, in the argument at the bar, divided into two denominations, called the first and second class of lands; and as they were also the sub-

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ject of different deeds, it will be expedient to keep in mind those denominations, which I propose to adopt.

It appears that under a settlement of the year 1689, Sir *Henry King* was tenant for 99 years, remainder to his first and other sons in tail male; that this Sir *Henry King* died in 1739, leaving *Robert*, his eldest son, who thereupon entered into possession as tenant in tail. This *Robert* suffered recoveries in 1746 and died in 1755, leaving *Edward*, his brother, his heir. This *Edward* by his will in 1797 devised property to his eldest son, *Robert*, in terms sufficient to embrace all the property he had power to dispose of, and this *Robert* devised the property to his second son, the present Lord *Lorton*, and his family. But it appears that in 1722, Sir *Henry King* and his brother *Robert*—Sir *Henry* being tenant for 99 years, remainder to his first and other sons in tail, remainder to *Robert* and his issue—levied fines and suffered recoveries, and by settlement limited the first class of lands to *Robert* in fee, and the second class of lands to Sir *Henry* in strict settlement; and that *Robert* by a settlement in 1724 limited the first class of lands to his brother, Sir *Henry*, in strict settlement, so that under these settlements, as well as under the original settlement of 1689, *Robert* was, in 1746, when he suffered recoveries, entitled in tail to both classes. It appears that the trustee to preserve, joined in the recoveries of 1722, but that cannot affect the question between the parties now litigant. However, Sir *Henry*, by his will, (though he had no power to do so, being only tenant for 99 years,) devised the second class of lands for the benefit of his younger sons, *Edward* and *Henry*; and by his codicil, devised all his lands which came to him upon the death of his brother *Robert* (which, it is contended, include the

first class of lands), as to one-half, to *Edward* for life, remainder to his first and other sons in tail, remainder to *Henry* for life, remainder to his first and other sons in tail; and as to the other half, in the same manner, putting *Henry* first, with a proviso, that if the estates settled on testator's marriage should come *Edward*, then that these estates should shift to *Henry*. It appears that, notwithstanding this will, *Robert*, the eldest son, possessed both classes at his death, and it does not appear that the second class of lands was ever claimed by the younger sons against the eldest. If, however, Sir *Henry's* will operated upon the first class of lands, his son *Henry* would be entitled to the whole of them, for life; remainder to his first and other sons in tail, remainder to *Edward* for life, remainder to his first and other sons in tail.

Upon *Edward* succeeding to *Robert*, in 1755, disputes having arisen between *Edward* and *Henry*, as to a supposed will of *Robert*, Lord *Kingsborough*, of 1752, by which he devised all his estates to his brother *Henry*, and which will *Edward* disputed, suits in Chancery were instituted, in which *Edward*, then Sir *Edward*, claimed the lands under the settlement of 1722, or as heir to *Robert*; and this was the question between the parties. But it also appears, that the settlement of 1724 was not known to Sir *Edward* at the time the parties entered into a compromise, by which *Edward* agreed that *Henry* should have all the estates given, or intended to be given to him, by the will of Sir *Henry*, as thereby provided, in consideration of which, and for the other considerations, *Henry* released all claim to all other the estates of *Robert*, which was confirmed by an Act of Parliament, which made the agreement, and the verdict setting aside the will of 1752, binding upon the issue of *Edward* and *Henry*, securing the first and second class of lands to *Henry*

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and his issue, whether Sir *Henry* had power to dispose of them or not; but the remainder to *Edward* and his issue, to take effect only so far as Sir *Henry* had a right to dispose of the same. The Act then reserves the right of the sisters under the will of 1746, which reservation proves that the existence of the will was then known, and that neither of the contending parties treated it as affecting the contest between them, it not being mentioned in any other part of the Act or at all in the agreement. The effect therefore was, that if Sir *Henry* had no power to dispose of these estates, (which appears to have been the fact, and they therefore came to *Robert* upon Sir *Henry's* death, in 1739, and were subject to the recoveries in 1746,) *Edward* was entitled to these lands, subject to the life estates of *Henry*, who died in 1821, the Act of Parliament giving to *Henry* the life estate. This reversion, therefore, by Earl *Edward's* will, came to *Robert*, the second Earl of *Kingston*, and from him, by his will, to Lord *Lorton*. So far, it would appear to be clear, that Sir *Henry* was not seised in fee of any of the lands in question, but that *Robert*, his son, was entitled to them in tail, and became entitled to the fee by means of the recoveries in 1746; but on the part of Lord *Kingston*, by his answer in this cause, two grounds of title were set up; first, that Sir *Henry* had power to devise both classes of lands, having acquired the fee in the first class as heir to his brother *Robert*, or under a power reserved to *Robert* in the settlement of 1724; and to the second class, by purchase from the trustees of the settlement of 1722. It is obvious that these two grounds of title rest upon the assumption that the settlements of 1722 and 1724 were operative to bar the issue of Sir *Henry*, and to deprive them of their title under the settlement of 1688. But the facts upon which they rest, namely, the

execution of the power in the settlement of 1724, and the purchase under the deed of 1722, are not only not proved on the part of Lord *Kingston*, but are, I think, satisfactorily disproved on the part of Lord *Lorton*. If these lands passed under the will of Sir *Henry*, they would from his death in 1739 have belonged to his younger sons *Edward* and *Henry*; but it is an admitted fact, that *Robert*, the heir in tail, possessed both of them up to the time of his death in 1755.

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The second reason in Lord *Kingston's* appeal is intended to raise a case of election. Supposing Sir *Henry* not to have had a power of disposing of the lands, as *Robert*, his eldest son, was in possession of these lands after Sir *Henry's* death, the title by election would have been in *Edward* and *Henry* at that time, or in *Robert*, eldest son of *Edward*, and the tenant in tail under the will of Sir *Henry*, and he attained his majority in 1775. There is a total absence of evidence of many facts necessary to raise such equity, and an impossibility to act upon it at this time; and by the agreement of 1761, and the Act of Parliament of 1762, *Henry*, for certain benefits received, and for many years enjoyed by him, gave up all other claims; and *Robert*, Viscount *Kingsborough*, the eldest son of *Edward*, would not have set up a case of election against his father's estate, he taking the whole of it under his father's will, and being only tenant in tail under the will of Sir *Henry*. The third reason in the same appeal is founded on a misapprehension or misstatement of the deed of 1761, and of the Act of 1762, stating the effect of those instruments to be, to give effect to all the remainders in the will of Sir *Henry*; whereas the Act does indeed give effect to the estate intended for *Henry* and his issue, but gives effect to the remainder to *Edward* and his issue, so far only as Sir *Henry*

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had a right to dispose of the lands; and if there be any doubt as to the construction in this respect of the agreement of 1761, the Act of 1762 is a new agreement, and its provisions were binding on the parties.

So far, therefore, as Lord *Kingston's* appeal proceeds upon grounds independent of the supposed will of *Robert*, Lord *Kingsborough*, I am clearly of opinion that it has no foundation, and that in considering other parts of the case it must be assumed that *Robert*, Lord *Kingsborough*, was seised in fee of the lands in question. Assuming that to be so, Lord *Kingston*, by his appeal, contends that his title, under the alleged will of *Robert*, Lord *Kingsborough*, in 1746, is so clear, that Lord *Lorton's* bill ought to have been dismissed at the hearing. On the other hand, Lord *Lorton*, by his case, in answer to Lord *Kingston's* appeal, insists that he ought to have had a decree without any issue, the object of the bill being to procure a conveyance of the legal estate, which had been vested in *Henry*, the younger brother of *Edward*, as a trustee. It will therefore be material to examine the transactions relative to the will, independent of the evidence at the trial as to its validity.

It appears that *Robert*, Lord *Kingston*, father of the present Lord *Kingston*, was fully apprised of the will of 1746, for in 1781 he filed a bill against *Edward*, his father, stating that will to be in his possession, but that he had not known of it previous to his joining in the recoveries in 1776. *Edward*, the father, in answer to that bill, stated that the will of 1746 had been cancelled, and also revoked by a will of 1747 or 1748, which had also been cancelled, and that counsel had given an opinion that it was not a subsisting will, and that *Robert*, the son, had been informed of all these particulars before the recoveries were suffered in 1776. I refer to the proceedings at present, for

the purpose of showing that *Robert*, Lord *Kingston's* father, was fully apprised of the circumstances connected with the alleged will of 1746, and being so informed, and witnesses having been examined on both sides, he, in *February* 1785, by consent, dismissed his bill. It is true that the lands in question were not included in the recoveries of 1776; the dismissal, therefore, does not directly operate upon the title to them; but the proceedings prove that *Robert*, Lord *Kingston's* father, was, in 1781, informed of all the circumstances upon which the present Lord *Kingston* rests his title, and with this knowledge abandoned his suit to set aside the recoveries of 1776, which he had impeached upon the supposed validity of the will of 1746. I have before said that I do not treat that dismissal as conclusive against Lord *Kingston's* claim to the lands in question; but it would be contrary to all principle not to consider as most important the fact, that the validity of the same will was in issue. The parties litigant had similar interests with the present litigants, and the parties setting up the will abandoned the claim now more than 50 years ago. It is most important to consider what were the relative situations of the different parties upon either supposition, as to title, in the year 1762, when the Act passed. If *Robert* had obtained the fee of the lands in question, and of the other family estates, and died intestate, the whole descended upon *Edward*, as his next brother and heir. But if *Henry* could establish the will of 1746, the will of 1752 being displaced, he was, according to Lord *Kingston's* case, entitled by virtue of that will to require his brother *Edward* to convey and assure to him and his heirs absolutely, the real and leasehold property devised to or settled upon him, *Edward*, by his father, Sir *Henry*. In 1757 *Edward* obtained a verdict against the will of 1752 set up by

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Henry, which verdict was never set aside. In the pleadings in equity between *Edward* and *Henry*, after this verdict, when it was obviously *Henry's* interest to set up the will of 1746, as the prospect of establishing the will of 1752 must have been then hopeless, the circumstances of that will are fully stated by *Mark Whyte*, but *Henry* does not appear to have set up his title under that will. It is true that, by the agreement of 1761, he took benefits as large, and probably larger than he could have taken under the will of 1746, and his acquiescence certainly could not bind the issue of *Edward*. But not only is the will of 1746 not mentioned in the agreement, but the provisions of it assume that, except for the disputed will of 1752, *Edward* would be seised in fee as heir of *Robert*; and *Henry* not only agrees that *Edward* shall be so considered, but is content to take a conveyance of part of the family estates, which, but for the Act, would have been inoperative, if the will of 1746 had been a subsisting will. The Act of 1762 does, indeed, allude to that will, and in one part mentions it; but it is obvious, I think, that the framers of that Act intended to avoid interfering with that or any other alleged will of *Robert*, beyond what was necessary to carry into effect the professed objects between *Edward* and *Henry*.

I therefore concur in the opinion of Lord *Phenket*, that this Act cannot be considered as affecting the rights of any of the issue of *Edward*, as to the land now in question; but it certainly does not assist such claim in the limitation after the death of *Henry* without issue; being "so far forth as Sir *Henry* had right or power to devise or dispose of the same, and not otherwise;" and it must be observed, that if there had been any idea that the issue of *Edward* were entitled under the alleged will of 1746, such an Act could

not have been permitted to pass, as it not only gave to *Henry* estates which might otherwise have descended to such issue upon the death of *Edward*, but devotes other lands, to which they would, in that event, have been clearly entitled, to the purposes of *Edward's* marriage-settlement, and to raising 10,000 *l.* for himself; so that, although it does not, in terms, affect the title now set up under the will, its provisions can only be explained by supposing that none of the parties to the Act entertained the idea of that will having any legal validity. But although the effect of that Act was to prevent any adverse possession of the lands in question, and any direct litigation as to the title to them during the life of *Henry*, which continued till 1821, the questions upon which that title depends were examined between *Edward* and his son *Robert*, Lord *Kingston's* father, in 1781, and the whole of the proceedings in that cause are most important.

In 1775, if the will of 1746 was not operative, *Edward* was seised in fee of the family estates; but if it was operative, then he was only tenant for life, and *Robert*, his eldest son, was first tenant in tail. Under these circumstances *Edward* was desirous of clearing the title by getting his son to join in recoveries, and for that purpose, by a letter of the 20th of *June* 1775, he very fairly puts his son in possession of the state of the case, sends him the counterpart of the will of 1746, *Mr. Yorke's* opinion in 1762, that the will was not valid; and refers him to the declaration of *Mrs. Riddick*, who was not only then living, but lived till *December* 1779. These facts are admitted in *Robert*, Viscount *Kingsborough's* answer; also, that he himself took an opinion upon the question. With all this information *Robert*, Viscount *Kingsborough*, joined his father in suffering recoveries in 1776; and it appears from a letter of the 28th of *February* 1778, set out in his

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answer of *May* 1782, that he and his father had quarrelled in that year, and that the son then set up a title under the will of 1746, and complained that his father had deprived him of that title by the recoveries of 1776. But at that time, Mrs. *Riddick* was living, and the son took no steps to obtain redress for the supposed injustice occasioned by the recoveries, and to assert his title under the will, until after her death, which happened in *December* 1779, his bill having been filed in 1781. He also admitted that in 1780 his father offered to refer his title, as it stood before the recoveries, to three counsel of eminence and to abide by their opinion. This proposal not having been acted upon, *Robert*, Viscount *Kingsborough*, in 1781 filed his bill; and his father filed a cross bill; and in those causes witnesses were examined, and it was proved that no will of 1746 had been found among *Robert*, Lord *Kingsborough's* papers at the time of his death; that the will of 1747 was on paper, and *Hugh Hammersley* proved that, in 1758, he, on behalf of *Henry*, and in 1775, on behalf of *Edward*, saw Mrs. *Riddick*, and procured from her the statement as to the cancellation of the will of 1746. So far the evidence of *Hugh Hammersley* was free from all objection, as it only proved the fact that, in 1758, pending the contest between *Edward* and *Henry*, the latter was informed of what Mrs. *Riddick* had said as to the cancellation of the will of 1746, and as proving the statement of Mrs. *Riddick*, which was seen and considered by *Robert*, Viscount *Kingsborough*, and by his counsel in 1775, when she was living, and before the recoveries were suffered. In this state of things, *Robert*, the first tenant in tail under the will of 1746, if it was available, abandoned his claim under it, and dismissed his bill, not under any compromise of his claim, so far as appears, except that the dismissal

was without costs. I have already stated the reasons why that dismissal cannot, in my opinion, be considered as conclusive of the title to the lands in question, even if the plaintiff in that suit had been asserting his right to them. It is, therefore, not material to consider how far an issue in tail would have been bound by such a proceeding by the tenant in tail; but the matter in issue was the same, and the party litigant was tenant in tail, through whom the present Lord *Kingston* claims; clearly, therefore, the depositions in that cause, the answer of the tenant in tail, and his act in abandoning the claim, and dismissing the bill, are receivable in evidence in this cause. *Edward*, the first Earl, having thus established his title as against his son, to the fee of the family estates, devised them in terms which included the reversion of the lands in question, expectant upon the death of his brother *Henry*, to his said brother, in trust for his son *Robert*, in fee; and the present Lord *Kingston*, being heir at law of that *Henry*, the fee became vested in him as trustee, if it was vested in *Edward*. If, therefore, *Edward* had devised the reversion to his son direct, or to any other person in trust for him, and Lord *Kingston* had been advised to assert his claim under the will of 1746, he would probably have had to do so as plaintiff at law or in equity; but he being trustee under *Edward's* will, it became necessary for Lord *Lorton* to file his bill for the purpose of obtaining the legal estate. The creation of this trust cannot prejudice the rights of the parties. This bill was filed in 1827, and the claim under the will of 1746 was set up by the answer, and a cross bill having been filed, both causes came on for hearing in 1831, when the issue was directed; and a verdict having been found upon that issue against the will, a motion

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was made for a new trial in the Court of Chancery in *Ireland*.

It cannot be necessary to call to your Lordships' recollection that a court of equity is not bound to send an issue to a new trial, because evidence has been received which was not legally receivable, or because admissible evidence was rejected, or because the judge in some respects inaccurately stated the law to the jury. The true consideration always is, whether, upon the whole, there appears to be such a case as enables the judge in equity satisfactorily to administer the equities between the parties, without the assistance of another trial. In this case, Lord *Kingston*, as heir to *Henry King*, his great uncle, has vested in him whatever freehold estate passed under the will of *Edward*, first Lord *Kingston*, and therefore whatever freehold estate Sir *Robert King* (Lord *Kingsborough*) died seised of. But Lord *Kingston* says, "I do not hold the lands in question by that title, but as my own, under the will of Sir *Robert King*, (Lord *Kingsborough*,) in 1746." Is there evidence upon which a court of equity can now satisfactorily decide between these two alleged titles? and if there be not, is there any probability that another trial will give the court better information and more assistance? First, what was the evidence at the hearing when the issue was directed? The decree does not state what that evidence was, but it is alleged that, on the part of the plaintiff, Lord *Lorton*, there were read some of the proceedings in the suit which ended in the Act of 1762, and the proceedings in the suit which ended in the decree of dismissal of 1785, and the depositions in those causes, of *Holt Waring*, *James Glascock*, *John Wallis*, *William French*, *Gilbert King*, *Hugh Hammersley*, *John Verner*, *Charles Tarrant*,

and *Nathan Drake*. *Holt Waring* proved the will of 1747, and searches after the death of *Robert*, Lord *Kingsborough*, in 1755, and that no will was found but that of 1752. *James Glascock* proved, that the debts of *Robert*, Lord *Kingsborough*, exceeded the amount of his personal estate; that the negotiation which preceded the agreement of 1761, was for a time suspended by *Mark Whyte* having produced the will of 1746; but that it afterwards proceeded upon the same footing as before the production of that will; that claims were set up by the sisters of *Robert*, Lord *Kingsborough*, in respect of legacies given to them by that will, which led to the opinion of counsel being taken, and particularly that of Mr. *Charles Yorke*; that those three sisters married after the year 1746, and received portions from *Robert*, Lord *Kingsborough*. *John Wallis* proved, that *Mark Whyte* acted as solicitor for *Robert*, Lord *Kingsborough*, and afterwards for *Henry King*. *William French* proved searches after the death of *Robert*, Lord *Kingsborough*, and that no will but that of 1752 was found, and that *Henry King* had possession of all the papers. *Gilbert King* also proved the searches, and that no will but that of 1752 was found. *Hugh Hammersley* proved having examined Mrs. *Riddick* between the years 1755 and 1758, by direction of *Mark Whyte*, solicitor for *Henry King*, as to the cancellation of the will of 1746, and transmitting her account of it to *Mark Whyte*. He also proved having again examined her in 1776, by the direction of *Edward*, Earl of *Kingston*, and transmitting her statement to him. *John Verner* and *John Palmer* proved taking Mr. *Yorke's* opinion for *Edward*, Earl of *Kingston*, in October 1762. *Charles Tarrant* and *Nathan Drake* proved the death of Mrs. *Riddick*. On the part of the

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defendant, Lord *Kingston*, some of the proceedings in the suit, which terminated in the Act of 1762, were read; particularly the answers of *Edward* of the 17th of *November* 1756, and the 21st of *April* 1758, and the answer of *Mark Whyte* of the 21st of *February* 1758 (although some question was made as to whether that answer of *Mark Whyte* was to be read on the part of Lord *Kingston*, or the other party); also some of the proceedings which ended in the decree of dismissal of 1785, and particularly the answer of Earl *Edward*, of the 4th of *June* 1781, and the depositions of *Arthur Maguire* and *Edward Sexton Perry* in that cause, and of *Bernard Higgins* in the present cause. *Arthur Maguire*, one of the witnesses to the will of 1746, proved its execution, and *Bernard Higgins* proved finding the part produced amongst the papers of *Thomas Kemmis*, who had been the solicitor of *Edward*, Earl of *Kingston*.

It does not appear that any objection was taken at the hearing to any of this evidence, and no such objection is raised by the present appeal, although the decree made upon that evidence is appealed from. The result of this evidence is, that there were originally two parts to the will of 1746; that one part was deposited with *Mark Whyte*, and afterwards returned by him to the testator; that the testator afterwards made a will of 1747, and another of 1752, which latter will was not properly attested; that no part of the will of 1746 was found among his papers at his death; that in 1758, or some short time before that year, the will of 1746 was produced, and the validity of it inquired into, as to the fact and as to the law. Upon these facts on behalf of *Henry King*, who was interested in setting up that will, an arrangement followed in 1761 and 1762, by means of the Act,

totally inconsistent with the validity of the will, and injurious to the interests of many of those who would have been entitled under it.

A similar inquiry took place in 1775, to which *Robert*, Earl of *Kingston*, the tenant in tail, under whom the present Lord *Kingston* claims, was a party, which ended in his withdrawing the claim he had set up under that will, and dismissing his bill filed to establish it. *Henry King* and Lord *Kingston's* father had the professional assistance of *Mark Whyte*, the solicitor of the testator, who had prepared all the wills for the supposed testator, and until 1779, Mrs. *Riddick*, a most important witness, as to the alleged cancellation of that will, was alive; but upon all those occasions, the claims made under that will were not insisted upon, and the two latter were directly abandoned.

Under these circumstances, and considering that the facts to be tried are between eighty and ninety years standing, and incapable therefore of living testimony, I should have hesitated long before, in such a case, I should have thought it the duty of a judge to direct an issue to try such facts. It was said, that the court was bound to put the question into a course of legal trial. I cannot assent to that proposition. An heir, against whom a will is sought to be established, is entitled to an issue, but in this case, the party claiming the benefit of a trial at law is the party setting up a will against the heir. *Robert*, (Lord *Kingsborough*,) is the supposed testator, and Lord *Kingston* claims under his alleged will. *Edward* was the heir of *Robert*, whose title as such is now vested in Lord *Lorton*. Lord *Lorton*, indeed, acquiesced in the decree directing the issue; but in considering whether, after the verdict in that issue, there is suffi-

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cient now to satisfy the conscience of the court, and to enable it to dispose of the question between the parties without a new trial, it is most important to consider whether the case at the hearing was so circumstanced, and so doubtful, as to require a trial at law. It was argued that an issue was not the proper mode of trial, and that Lord *Lorton* ought to have been left to an ejectment, the Court of Chancery removing the legal bar. I see no ground for that. The bill was for the execution of a trust; an adverse title is set up, founded upon the supposed validity of an instrument. This is precisely the case for an issue, if any trial was required.

It was then said, that the decree ought not to have directed that the depositions should be read at the trial, without, at least, a reservation of just exceptions. It appears, however, that all the depositions were read at the hearing without objection, and if no injury has resulted from that omission, it is not after the trial a proper subject of appeal. The objection now made to Mrs. *Riddick's* declaration, as deposed to by *Hammersley* (for her declaration itself was rejected at the trial), is rather to the use made of it than to its admissibility; because, if the conduct of *Henry* and of *Robert*, Lord *Kingston's* father, as to this instrument, be admissible, which has not been questioned, it must be competent to show what information they had upon the subject. The fact stated in Mrs. *Riddick's* declaration cannot be considered as proved by it, but that declaration, coupled with Mr. *Hammersley's* depositions, proves that *Henry* and *Robert* adopted the course which they followed with the knowledge of what she had said upon the subject, and as to which she was then in a situation to be examined.

If, after the death of all the witnesses who could have spoken to the transaction in question, the jury had found a verdict in favour of the will, upon the production of one part, it being proved that there was another part which was not produced, I could not have acted upon such a finding, and have established a will, which, whilst the witnesses were living, and the facts capable of investigation, the parties interested had, under advice, and after full investigation and protracted litigation, deliberately abandoned as invalid. It is true that *Henry*, one of those parties, was only tenant for life; but the importance of the conduct of a party so circumstanced is well observed upon by Lord *Ellenborough* in the case of *Roe on the demise of Brune v. Rawlings* (f).

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The issue, however, was tried, and a verdict found against the validity of the will of 1746. To that issue both parties now object, both assuming that a sufficient title was made out on their respective parts to entitle them to judgment without an issue. Whether that be so on the part of Lord *Lorton* it will not be necessary to consider in the view I take of this case; but I think it clear that the proposition on the part of Lord *Kingston* cannot be maintained. The issue was tried at the bar of the Court of King's Bench, and it appears from the Judge's notes, that on the part of Lord *Kingston*, the plaintiff in the issue, no witnesses were in the first instance examined, except *Patrick Crowe*, to prove the death of a former witness, *Bernard Higgins*. The only depositions read were those of *Bernard Higgins* and of *Maguire*. All his other evidence consisted of documents, being part of some of the proceedings which ended in the Act of 1762, and of the proceedings which ended in the

(f) 7 East, 288.

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decree of dismissal of 1785. On the part of the defendant, Lord *Lorton*, there were read several of the depositions in the cause which ended in the decree of dismissal of 1785, *Mark Whyte's* answer of 1758, and many documents, to none of which was any objection made. But on the defendant's offering *Edward's* answer of 1755, it was objected to, but admitted, because read at the hearing. Upon looking at that answer, I do not find that it contains anything which can possibly affect the present question. It appears then from the Judge's notes, that a part of the answer of *Edward*, Earl of *Kingston*, of 1781, was offered and objected to; but, being received, the plaintiff insisted upon reading the whole of it, and also his answer of 1758, in order to qualify the answer of 1781, the whole of which, though objected to, was read.

Lord *Kingston* does not claim under *Edward*, Earl of *Kingston*, and in 1781 the latter was contesting the will of 1746. His answer, therefore, could not by itself be evidence against Lord *Kingston* as to the facts stated in it, but as the act of the plaintiff in that cause, namely, *Robert*, Earl of *Kingston*, the present Lord *Kingston's* father, in dismissing that bill in 1785, is clearly evidence against the present Lord *Kingston*, I think it clear that all the proceedings in that suit are proper evidence to show what the case was, to which the act of *Robert*, Earl of *Kingston*, applied.

The defendant then offered the written declaration of Mrs. *Riddick*, which was rejected.

The only witnesses examined for the defendant were *Thomas Kemmis* and *Michael Fox*, as to searches for the will; and for the plaintiff in reply, *Thomas Jones*, *Matthew Franks*, and *James Fahey*, who proved finding the original will of 1746 on the 12th of May 1830, among some papers of Mr. *Kemmis*, jun.

It is very probable that the jury did not very correctly understand how far, and for what purpose, they were at liberty to take into their consideration the evidence of Mr. *Hammersley* as to Mrs. *Riddick's* statement; and I think the observations of the learned Judge were not unlikely to lead them into error on that subject. But I have no doubt that their verdict ought to have been the same, if they had made only the proper use of it; and if I am correct in that view of the evidence, it is a conclusive answer to an application for a new trial. The learned Judge drew the attention of the jury to the presumption of law from the facts proved, independently of Mrs. *Riddick's* declaration; and it appears to me that the legitimate deduction from such facts, and the proper legal presumption ought to have led to a verdict against the will; such presumption would necessarily exclude the point insisted upon on behalf of Lord *Kingston*, that the cancellation, if it took place, was in preparation for another will, which did not take effect. I do not find any facts in this case to prove or lead to any presumption that such was the purpose of the cancellation, if any took place.

As might have been supposed, there was no new evidence of any value produced before the jury touching the merits of the case, the only witnesses examined being as to searches made for, and the finding of the will of 1746 in 1830, in the possession of Mr. *Kemmis*, whose father had been the solicitor of *Robert*, Lord *Kingston's* father; and this possession corresponds with the facts stated, that in 1775 the will had been delivered by *Edward* to his son *Robert*. It appears also, from the Judge's note, that Mrs. *Riddick's* declaration was not read, but that *Hammersley's* deposition as to the declaration was read; and I do

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not see how that could have been rejected. Both parties had given evidence of the transactions which preceded the Act of 1762, and which arose in the suit which ended in the dismissal in 1785 ; and what *Hammersley* deposed to were essential parts of those transactions. It is not alleged that any more information as to the merits of the case could be brought before another jury ; and such evidence as exists consisting solely of documents, of pleadings and depositions in former suits, may be at least as satisfactorily considered, and conclusions as safely drawn from them by the Court, as by a jury. Of this opinion I possibly should have been, if I had to decide upon the original hearing ; the result of the trial, and the view taken of the case by the Learned Judge who tried it, corresponding with the impression made upon my mind by the evidence at the hearing, now confirm that impression. It is impossible not to feel some anxiety in coming to a conclusion affecting property of a considerable amount, upon facts so remote, and upon inferences rather than direct proofs ; but I am satisfied that more information cannot be obtained by sending the question to another jury ; and if another jury were to find a verdict in favour of the will upon the evidence as it stands, I do not think the Court could satisfactorily act upon such a verdict.

I am therefore of opinion, that the order, directing a new trial, complained of in the original appeal, ought to be reversed, leaving it to the Court of Chancery in Ireland to deal with the cause upon the equity reserved ; and also that Lord *Kingston's* appeal against the original decree ought to be dismissed, with costs.

An order to that effect was accordingly made.

IN COMMITTEE FOR PRIVILEGES.

1838.

The HUNTLY Peerage.

May 31.
June 8. 22.

Upon a claim to a Scotch peerage, where no patent of creation can be found, but it appears from the records of the Parliament that the ancestor from whom the dignity is alleged to have descended, sat in Parliament, an original instrument, purporting to be under the Great Seal of Scotland, and produced from the repositories of the heir of entail of the family estates, will be received as evidence of the creation of such peer, with a limitation to him and his heirs male, as therein stated.

Evidence.
Prayer of
Petition.

If a claimant omit to give evidence of the creation and limitation of one of several dignities to which, he states, in his petition, that he is of right entitled, the Committee for Privileges will not report that he has made good his claim to that dignity, on the presumption that it descended from the same ancestor with the other dignities to which the claimant has proved his right.

In a claim of peerage, it is not sufficient, in the petition to the Crown, to state that the claimant is of right entitled to the dignity, but the petition should pray that the claimant may be declared so entitled, and the Committee for Privileges, or the House has no power to supply the defect of the prayer, but it will be necessary for the claimant to present an amended petition to the Crown.

GEORGE, fifth and last Duke of *Gordon*, eighth Marquess of *Huntly*, &c., having died without issue in *May* 1836 (whereupon the Dukedom and also the Earldom of *Norwich* in the Peerage of *England* became extinct), *George*, Earl of *Aboyne*, presented a petition to his Majesty *William* the Fourth, stating "his right to the titles, honours, and dignities of Marquess of *Huntly*, Earl of *Enzie*, and Lord *Gordon*

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and *Badenoch*," all in the Peerage of *Scotland*, and praying that His Majesty would be pleased to give the proper directions for enrolling him as Marquess of *Huntly* in his due place in the Union Rolls among the peers of *Scotland*.

This petition was referred by His Majesty to the House of Lords, and by the House to the Committee for Privileges, before whom the claimant produced evidence, showing that he was lineally descended from, and was the nearest male descendant and lawful heir of *George Gordon*, who was sixth Earl of *Huntly*, and in 1599 was raised to the dignity of Marquess, by the style and title of Marquess of *Huntly*, Earl of *Enzie*, Lord *Gordon* and *Badenoch*.

The claimant gave no evidence of the creation of the Earldom of *Huntly*, but showed by examined copies of records of the Chancery, and of the Parliament of *Scotland*, that the said *George*, sixth earl, was upon the death of his father, *George*, the fifth earl, in 1575, served and returned nearest and lawful heir to his father in the family estates, and sat among the earls in the Parliament of *Scotland*.

As to the creation and limitation of the marquissate, &c., the claimant, after showing by the evidence of the Keeper of the Public Records of *Scotland*, that there was no patent or charter of creation of that title to be found among those records between the years 1596 and 1606, and by examined copies of the records of the Scotch Parliament of the 3d of *July* 1606, that "the Marquess of *Huntly*" was mentioned among those then chosen Lords of the Articles, offered in evidence an original instrument brought from the repositories of the Duke of *Richmond*, the heir of entail of the *Gordon* estates. The following is an abridged copy :—*Jacobus Dei gratia, &c. Rex, omnibus probis, &c. salutem : Sciatis nos considerantes*

nobilitatem morum, probitatem, &c. quibus viget, &c. charissimus consanguineus noster Georgius Marchius de Huntlie, &c. volentes ipsum honoris prærogativa juxta suorum meritorum exigentiam exaltare, de gratia nostra (17th April 1599) decimo septimo, ex certa scientia proprio motu ac de avisiamento consilii nostri eundem consanguineum nostrum in Marchionem de Huntlie ereximus et creavimus, necnon nomen, titulum, &c. et dignitatem Marchionis de Huntlie, præfato consanguineo nostro dedimus et concessimus unacum omnibus præminentiis, &c. eisdem honori et dignitati pertinentibus, ipsumque Marchionem de Huntlie, Comitem de Enze, Dominum de Gordoun et Badzenoch, per gladii cincturam creavimus, ac unam cappam honoris et dignitatis, et circulum aureum super caput suum posuimus, ut omni tempore futuro, ipse et heredes sui masculi habeant, et teneant, nomen, titulum, stilum, statum, honorem, et dignitatem Marchionis de Huntlie, Comitatus de Enze, Dominorum de Gordoun et Badzenoch. In cujus rei testimonium huic presenti magnum nostrum sigillum in testimonium præmissorum apponi præcepimus."

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The Committee received the instrument in evidence, after some discussion between Sir *W. Follett* and Mr. *H. Gordon*, counsel for the claimant on one side, and the *Lord Advocate* (Mr. *Murray*), on behalf of the Crown, who did not oppose its reception, but submitted whether it was sufficient proof of the creation and limitation of the dignity in question.

After the necessary proofs were received,

The *Lord Advocate*, admitting that the Earl of *Aboyne* had satisfactorily proved his claim, called their Lordships' attention to the form of his petition, which stated his right to the titles, &c. but did not pray that he may be declared entitled to the enjoyment of

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them; praying only, that proper directions may be given for “enrolling the petitioner’s name as Marquess of *Huntly* in his due place in the Union Rolls,” &c.

Lord *Brougham* :—The objection is kindly taken, and we should have no objection to add the necessary prayer to the petition. But it is only matter of form.

Lord *Shaftesbury* (Chairman of the Committee) said, their Lordships had no power to add to, or alter, the petition. They were only to report upon the petition which was referred to them.

The Duke of *Buccleugh* and Lord *Aberdeen* referred to the case of the Marquess of *Queensberry*, in 1812, the prayer of whose petition was the same as the prayer of the present petition.

Sir *Wm. Follett* submitted that he (the Marquess of *Queensberry*) was then a commoner, and was bound to pray for the enjoyment of the dignity. But the Earl of *Aboyne* was enjoying the dignity of the peerage, and did not think it necessary to pray for any declaration of right to his titles. He referred to the order of the House, regulating the form of petitions for *Scotch* Peerages, and observed, that what was now asked was done in the *Polwarth* Peerage case. With the permission of their Lordships, the Lord Advocate consenting, the claimant would present an amended petition to The House.

The *Lord Chancellor* :—It must be a petition to the Crown, and it may be referred to the House. But it will not be necessary to go over the evidence again. The petitioner has not claimed the Earldom of *Huntly* or given any evidence on it.

The claimant next day presented a petition to Her Majesty, showing that, in *February* 1837, he presented a petition to His late Majesty, stating and praying as before stated ; and that such petition was by His late Majesty referred to the House, and by the House to the Committee of Privileges, who heard evidence, “ by which it was shown, that the ancestor from whom the petitioner was lineally descended as heir male, also enjoyed the honour and dignity of the Earldom of *Huntly*, and that the Earldom was by presumption of law descendible in the same line in which the marquise was descendible ;” and praying, “ that Her Majesty will be graciously pleased to declare that the titles, honours, and dignities of Marquess and Earl of *Huntly*, Earl of *Enzie*, and Lord *Gordon* and of *Badenoch*, of right belong to and ought to be enjoyed by the petitioner ; and also, that the proper directions may be given for enrolling the petitioner as Marquess of *Huntly* in his due place in the Union Roll among the peers of Scotland.”

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This petition was by Her Majesty’s command referred to the House, and by the House to the Committee for Privileges, who met and considered the same on the 22d of June, and reported to the House that the petitioner, the Earl of *Aboyne*, had made good his claim to the titles, honours, and dignities of the Marquess of *Huntly*, Earl of *Enzie*, Lord *Gordon* and *Badenoch*, and that he ought to be enrolled in his due place as such upon the rolls of the Peers of *Scotland* ; and also, that the petitioner not having insisted on his claim to the Earldom of *Huntly*, had not made good his right to the same.

The House resolved accordingly, and the resolution was presented to Her Majesty.

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August 14.

WRIT OF ERROR.

GEORGE GARLAND, Esq. - - *Plaintiff in Error.*

THOMAS CARLISLE, Assignee, &c. *Defendant in Error.*

*Interest on
Judgment.*

On a judgment affirmed on writ of error the House of Lords gives interest from the day of its affirmance by the Exchequer Chamber, pursuant to the provisions of the statute 3 & 4 Will. 4, c. 42. s. 30.

AFTER the House had affirmed the judgment in this case (reported *ante* vol. 4, p. 693), the defendant in error presented a petition to the House, stating that he had brought his action in 1825; that when the judgment recovered by him therein was affirmed in the Exchequer Chamber in the year 1833, the damages and costs then due to him as such defendant in error amounted to 1,003*l.* 4*s.* 6*d.*; that by section 30 of the Act 3 & 4 Will. 4, c. 42, "An Act for the further amendment of the law, and the better advancement of justice," it is enacted, "that if any person shall sue out any writ of error upon any judgment, &c. and the Court of Error shall give judgment for the defendant thereon, then interest shall be allowed by the Court of Error for such time as execution has been delayed," &c.; and that in the affirmance of said judgment by the House no mention was made of interest or costs. The petitioner prayed that their Lordships would be pleased to add to their order of affirmance of the said judgment, a declaration of the petitioner's right to receive interest on the amount of his said judgment pursuant to the said statute. The petition was referred by the House to the Appeal Committee, who, after hearing the argu-

ments of the parties thereon, reported on the 19th of August 1838, that under the provisions of the said Act the petitioner was entitled to receive interest at the rate of *four per cent. per annum* on the amount of his said judgment, for delaying execution thereof from the 20th of *November* 1833, and that the same should be added to the judgment of the House.

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The House agreed, and ordered accordingly.—
Lords' Journ. for 1838, p. 730.

1838:

Monday,
12 March.Thursday,
16 August.

A P P E A L

FROM THE COURT OF SESSION.

JOHN BOYLE GRAY, one of the Council-
lors of the Royal Burgh of GLASGOW,
and one of the Trustees under BELL's
Deed of Indenture - - - - - } *Appellant.*

The Rev. JOHN FORBES, and Others - *Respondents.*

*Pleading.
Practice.
Competency of
Appeal.*

A summons of declarator charged the Lord Provost, magistrates, and town council of Glasgow, with the breach of an agreement entered into by their predecessors with regard to the administration of a trust fund; and prayed "that the said Lord Provost, magistrates, and council, and *A. B. C. D.* &c.," reciting the name of every one of them—"for themselves, and as representing the burgh and community of Glasgow, ought to be decerned." The Court of Session pronounced an interlocutor, decerning "against the defenders in terms of the conclusion of the libel," declaring them liable in expenses, and specially directing that no part of the expense of this litigation should form a charge on the trust fund. HELD, that such an interlocutor appearing to affect the interests of each individual member of the corporation, any one member was by law entitled to appeal against it.

Where *A.* presents a petition of appeal, and *B.* presents a counter petition, praying that the former may be dismissed as incompetent, *B.* is entitled to begin on the argument as to the competency of the appeal.

THE question intended to be raised by this appeal was, whether an individual member of a corporation all the members of which were constituted trustees under a deed for charitable purposes, could competently present to the House of Lords an appeal against

a judgment of the Court of Session, sanctioning acts of those trustees, which acts that member deemed to involve a mal-administration of the trust.

The Rev. Dr. Andrew Bell, of Egmore, prebendary of the collegiate church of St. Peter, Westminster, by a deed of indenture, dated 14th July 1831, and executed between him on the one part, and William Haig, Esq. provost of the burgh of St. Andrew's, and others, as trustees, on the other part, invested in those trustees certain large sums of money for the purpose of the more effectual diffusion of the Madras system of education, of which Dr. Bell claimed to be the author.

The indenture directed the trustees, among other things, to retain the sum of 2,500*l.*, "for the payment of such costs and expenses as are hereinafter defined; and subject thereto to divide the said stocks into twelve equal parts, and to transfer one such twelfth part unto the provost, magistrates, and town-council of Edinburgh; one other such twelfth part unto the provost, magistrates, and town-councils of Glasgow;" and in like manner unto the town-councils of certain other burghs. The provost, magistrates, and town-council of Glasgow accepted this trust.

The superintendence of the parochial schools of Scotland is placed by law under the charge of the church; and the magistrates and town-council of Glasgow conceived, that while it was their duty, as trustees of Dr. Bell, to retain the inspection and control of the schools to be established under his bounty, they should greatly promote the purpose he had in view, if they could prevail upon the ministers and kirk-sessions, within their several parishes, to take the active superintendence of the several schools to be established under this trust. Accordingly, upon

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the motion of the Lord Provost, a committee of the town-council was appointed to hold a conference with the ministers of Glasgow upon this subject ; and after several meetings, it was ultimately agreed, that upon the ministers and kirk-sessions establishing schools upon the Madras system in their respective parishes, they should each receive an equal share, half yearly, of the dividends or interest accruing from the sum placed by Dr. Bell at the disposal of the town-council for this purpose. This proposition was agreed to by the several ministers and kirk-sessions. But it was expressly stipulated, that the kirk-sessions, before any payment should be made to them, should exhibit annually to the town-council a *vidimus* or statement of the application of the sums proposed to be paid, showing, to the satisfaction of the council, that the same were to be applied to the promotion of Dr. Bell's, or the Madras system of education ; and, further, that it should be imperative upon the kirk-sessions to intimate to the corporation the annual public examinations of the schools within the several parishes, so that two members of the corporation, at least, might have an opportunity of attending and satisfying the other members that Dr. Bell's mode of education was regularly and systematically carried on. It was further stipulated, that each of the schools should be denominated by the name of the parish.

The magistrates and council then entered into formal contracts or agreements with each of the kirk-sessions, by which, while the kirk-sessions on the one hand became bound to establish, in their respective parishes, schools on the Madras system, under the stipulations already mentioned, the magistrates and council, on the other hand, engaged to pay over, so long as these stipulations were observed, the dividends or interest arising from the sums placed in their

hands by Dr. Bell. One of these contracts was entered into by the Respondents, who constituted the kirk-session of the Outer High Church and Parish, and who received for their school the name of "The Outer High Church Parish School on Dr. Bell's, or the Madras System." These contracts having been communicated to, and taken into consideration by, Dr. Bell's original trustees, Provost Haig, Principal Haldane, and professors Buist and Alexander, at a meeting held by them on the 12th March 1835, they unanimously declared their opinion, that they "were in perfect accordance with the spirit and intention of Dr. Bell's deed of indenture, and of the deed of declaration of trust executed by the magistrates of Glasgow in reference to it; and the trustees farther gave it as their opinion, that the arrangement entered into between the said parties provided for and secured a most judicious application of the money."

After the Scotch Burgh Reform Act passed, the Appellant was elected a town-councillor, and thus became a trustee. The arrangement entered into by the old corporation became a subject of discussion in the town-council, and the members finally came to the opinion, that they ought not to recognize or carry into execution the transaction entered into between their predecessors and the Respondents, because they deemed it to be subversive of the objects and purposes of the trust, and consequently to involve serious acts of maladministration on the part of their predecessors. A different opinion having been formed by the Respondents, they resolved to compel the trustees to fulfil the contract, and for that purpose brought an action of declarator against them before the Court of Session. In the summons in that action, the Respondents, after having set forth what they represent as the tenor of

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the transaction, contract, and consequent liabilities, and alleged violation by the trustees, conclude: "And although the pursuers have frequently desired and required the said Lord Provost, magistrates, and town-council of the city of Glasgow, to fulfil their part of the said contract, by making payment to the pursuers of their said shares of the said dividends, in terms of the said contract; yet they refuse or delay so to do: therefore the said Lord Provost, magistrates, and council of the city of Glasgow, and the Hon. William Mills, *Lord Provost*, William Gilmour, James Lumsden, John Fleming, William Craig, and John Small, Esqrs., *baillies*, James Martin, Esq., *dean of guild*, Arch. M'Lellan, Esq., *deacon convener*, and Messrs. Hugh Tennent, Robert M'Gavin, James Turner, John Boyle Gray, Alexander Dennistoun, William Bankier, John Ure, Alexander Johnstone, James Wallace, Henry Brock, Robert Hutcheson, John Mitchell, John Douglas, James Hutcheson, Robert Dalgleish, Henry Paul, Henry Dunlop, William Dixon, David Hope, Alexander Denny, George Orr, John Leadbetter, John Pattison, and William Robertson, *councillors*, for themselves, and as representing the burgh and community of Glasgow, ought and should be decerned and ordained, by decree of the Lords of our Council and Session, to make payment to the pursuers of their portion, being one-tenth part or share of the annual interest, proceeds, or dividends, which have already accrued, or may hereafter accrue, on the foresaid two sums of 4,895 *l.* 16 *s.* 8 *d.*, making together 9,791 *l.* 13 *s.* 4 *d.*, transferred to the said defenders, as above-mentioned, and that half-yearly, agreeably to, and in terms of the contract between them and the said pursuers before narrated, in all time coming, so long as the pursuers shall fulfil and

observe their part of the said contract ; with the legal interest of the said annual proceeds, interest or dividends, from and after the terms of payment thereof till payment ; superseding execution so far as regards the proceeds or dividends not yet due, till the terms of payment shall be first come and bygone, and deducting the payment already made by the said defenders to the said pursuers, as before mentioned. And farther, in respect the said defenders have violated their said contract or agreement, and have failed to implement the same, they ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuers of 100*l.* sterling, being the liquidate penalty in that case stipulated and provided ; together also with 100*l.* sterling, or such other sum, less or more, as our said Lords shall modify in name of expenses of process, over and above the expenses of the decree to follow hereon ; conform to the said contract, laws, and daily practice of Scotland, used and observed in the like cases in all points, as is alleged.”

On the 29th November 1836, the Lord Ordinary pronounced an interlocutor, finding that the agreement was *ultra vires*, but directing payment to the pursuers of such sums as they had expended since the date of the agreement, and in pursuance of it.

Reclaiming notes against that interlocutor having been presented to the Inner House by the trustees, in so far as it sustained the title of the Respondents to sue, and by the Respondents on the merits, the Lords of the First Division pronounced the following interlocutor :—“ The Lords having advised this reclaiming note, and the reclaiming note for the defenders, refuse the reclaiming note for the defenders, and adhere to the interlocutor reclaimed against, in so far as it repels the objection to the title of the pursuers—*quoad*

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to the petition of appeal.—[Lord *Brougham*: But this is not an objection to your appeal upon the merits; they come here and say, Do not let them be heard at all. That amounts to what would be at common law a demurrer].—The Appellant is here to show that his appeal is well founded. He has, therefore, the right to begin; and the more so, as this case is peculiar in this respect, that the House is, in consequence of its own order, in possession of the printed cases of both parties. The Respondent's cross petition is merely a denial of the Appellant's right to be heard.

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Lord *Brougham*:—Here they appeal against your being heard. I put the case thus: Suppose you, as representing the Appellants, had come to the bar of this House from the Court of Session, asking us, by a parol petition, to reverse the decision of that Court, you would then in form, as in substance, have made an appeal to us against the decision of the Court below; but then Sir W. Follett appears, and says that he objects to your being heard. Surely his objection must be heard before you are allowed to proceed.

The *Lord Chancellor*:—The question is, Whether you are to be heard or not? It would be a curious proceeding for you to be heard first, when the question is whether you are to be heard at all.

Lord *Brougham*:—If you were heard now, there would be an end of the question of your right to be heard.

The *Lord Chancellor*:—In the ordinary way this question would be decided by the Appeal Committee; but it has been thought important enough to send it for the decision of the House. The objectors to the right to appeal must be first heard.

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The Counsel to be heard against the competency of the petition was accordingly ordered to begin.

Sir *W. Follett* :—The question is, whether the Appellant, who is one of the corporators of Glasgow, is entitled to bring before this House, a petition of appeal against a decree affecting the whole corporation. The contract here was made by the whole corporation, before the Appellant became a member of the body: that contract has since been declared to be legal by the Court of Session, which, in this respect, overturned the decision of the Lord Ordinary, to whom, in the first instance, the cause had been referred. The great majority of the new town-council of Glasgow has determined on abiding by this decision, but the Appellant alone opposes his own will to the decision of the Court, and of his fellow-councillors, and seeks to bring the matter under the consideration of this House. The question is, whether he can be permitted to do so. It is submitted that he cannot. He certainly would not be permitted to do so in England. The will of the majority of the council, when once declared, would be binding upon him. It may be said, on the other side, that all the members of the corporation are named in the summons; that is so; but it makes no difference in their liability. They are merely named in conformity with the rules of pleading in Scotland; but they are sought to be charged in their corporative, not in their individual capacity. As an individual member the Appellant cannot have an interest in the question, and the funds of the corporation, and not his private fund, are alone liable in this case. That would be so in England, and there is no distinction in this respect between the law of England and of Scotland on either of these points. What right

has an individual member, by his acts, to affect the interests of the corporation? He has none whatever. All the cases that can be cited on the other side will resolve themselves into this, that any person who is an object of the bounty of a charitable fund may institute proceedings for a breach of trust in its administration. But that rule will not justify an individual member of a corporation in interfering when the whole body of the corporation is collectively interested, and his own interest is not personal, but exists in him only as a member of that corporation.

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The *Attorney-General*, in support of the competency of the appeal :—The Appellant here has a strong interest in the matter, and nothing but a clear disproof of that interest will prevent this House from allowing him to be heard. The action in the Court below was against, not only the corporation of Glasgow, but against the individual members of it. The Appellant here would be liable to be taken in execution for the costs incurred in that suit. In cases of suits for alleged misapplication of funds, individuals may be sued with corporations, or two corporations may be sued together, or may be indicted. The agreement entered into by the old corporation was deemed by the new corporation to be contrary to the will of the founder, the members of the new corporation believing that they, being themselves delegates of a trust, could not delegate that trust to others; they therefore gave notice to the kirk-sessions, with whom the old corporation had entered into the agreement, that they would not perform that agreement. The action, which is the subject of the present appeal, was then brought to compel performance. The terms of the summons itself show that the action is brought both

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against the corporation and the individual members of it. The members are individually named, "for themselves, and as representing the borough and community of Glasgow." What is the meaning of the term "for themselves," except that the members of the corporation are sought to be rendered individually responsible? The prayer of the summons is, that these persons should be "decerned and ordained to pay" the money then claimed to have become due under the agreement, the money that in future may become due, and the costs. The decree is "against the defenders." How? As a corporation merely? No, but "in terms of the conclusions of the libel," that is, it is against them individually and collectively. It is clear, therefore, that if the corporation, as a corporation, could not pay, each member of it would be personally responsible under this decree, and payment might be enforced as against him individually. But the decree does not stop there, but goes on thus: it finds "the defenders liable to the pursuers in expenses, with this declaration, that no part of the expense of this litigation shall form a charge on the trust funds of Dr. Bell." From what source, then, are the costs to be defrayed? Each member of the corporation becomes liable to pay them; for first, there is a decree against the defenders "in terms of the conclusions of the libel;" and next, the costs which they are to pay are not to form "a charge on the trust funds of Dr. Bell." It is clear on the words of the decree, that the costs are not to be paid out of the charity funds, nor can they be paid out of the borough funds; for though the members of the corporation happen to be, in their municipal character, the trustees of the charity, the rate-payers of the borough have nothing to do with it. The money must come from the pockets

of those who are made defenders on this record. The Appellant, therefore, is personally interested in this matter, and has a right to appeal.

It is said that the naming of the members of the corporation is according to the rules of Scotch pleading. Even if that statement could be supported, which it cannot, it would not avail the Respondents here; for in this summons they have gone out of the usual course, and added the words "for themselves," which are clearly intended to fix an individual responsibility on the members of the town-council. But the argument, that it is necessary to name the members of a corporation is unfounded. If nothing more than a corporate responsibility is intended to be cast on them, they should be named not "for themselves and as representing the burgh," but "as *A, B, C, and D*, constituting the corporation." Darley's 'Practice' and Bell's 'Book of Styles' are, however, authorities against the argument, that represents the naming of the members of the corporation to be necessary. In the latter (*a*) it is said, "Where the pursuer or the defender is a corporation, and where the summons is at the instance of the members of a corporation, or against them, they must be described in general terms, as 'The Lord Provost, Magistrates, and Town Council of —;'" for where you name them, the death of any of so numerous a body might prove fatal to the action." That reason is expressly adopted and acted on in *Lockhart v. The Magistrates of Lanark* (*b*). In Darley's 'Practice of the Court of Session' (*c*) it is said, "In a summons against the magistrates and town-council of a borough, it is

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unnecessary to mention their names particularly." There are many authorities to show that, in a proceeding of this kind, the Appellant would be personally liable. *Boyd v Cunningham* (d) establishes that doctrine. There Mr. Cunningham, who was town-clerk of Linlithgow, had presented a petition to the magistrates and council of Linlithgow, seeking to have the custody of the records of registry of the borough. Nothing was done on that petition. Mr. Cunningham was subsequently called before the Court of Session by a burgess for not giving the complainant extracts from the registers, as it was the duty of the town-clerk to do. Mr. Cunningham, by his answer, brought the magistrates and council (of whom Mr. Boyd was one) before the Court, and prayed the Court to order them to deliver to him the custody of the registers, and "to find the said J. Boyd, and all the other persons above complained of, liable in expenses, as well as all other expenses and damages to which the petitioner might be put in consequence of their illegal conduct." At a subsequent meeting the magistrates disclaimed any opposition to his petition, but Mr. Boyd persevered. The Court gave judgment for the petitioner, and found him entitled to expenses, as prayed, reserving to the magistrates, &c. *inter se*, all questions as to the effect of the disclaimer by certain of their number, in relieving them from the expenses thus found due to the complainant. Mr. Boyd was, on a reclaiming note, held personally liable to the expenses by the terms of this judgment.

In the same manner, in *Bryson v. The Corporation of Glasgow* (e), the pursuer had raised an action against the magistrates of Glasgow, as representing

(d) 11 Shaw & Dunl. 58.

(e) 1 Shaw & Dunl. 156.

the community, to recover damages for injury done in a riot. The magistrates admitted the pursuer's right of action, but said that they were not bound to pay either from their own pockets or from the borough funds, but only by assessment on the inhabitants, and they prayed that the decree might be stayed till the inhabitants could be assessed. The decree was, however, pronounced against them, reserving to them their relief against the borough when it could be assessed to pay the same. There was an ultimate responsibility fixed on the borough in that case, because of the Act of Parliament; but that cannot be so here, for the right of suit here arises, not in respect of any matter in which all the inhabitants of the borough are interested, but in respect of alleged misconduct on the part of the corporation; so that the Appellant here is, at all events, responsible. A statutory liability is thrown on him. By the 3 Geo. 4, c. 91, s. 4, it is enacted, "That where the magistrates and members of the town-council of any burgh, or any number of them, are the sole trustees for any charity, &c. an account shall be annually stated and certified, in the manner hereinbefore directed, distinct from the account relative to the common good and revenues of that burgh; and such account shall be deposited in the town-clerk's office, and shall be open to the inspection of the burgesses; and if such annual account, relative to such charity, &c. shall not be so stated and deposited, then the magistrates and members of the town-council of such burgh, or such number of them as shall be trustees for such charity, shall severally be subject to a penalty of 50*l.* each." Here the personal liability of each member is declared in a matter which can only be executed by the will of the whole or of a majority. It is therefore

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clear that the Appellant may be personally aggrieved by this judgment ; and if so, he has a right to come here to have it revised by this House.

Sir *W. Follett*, in reply :—By the general principles of the law of England and Scotland, an individual member of a corporation is not liable to costs incurred by the corporation. But supposing it otherwise, a mere liability to costs would not give him the right of appeal. He is not interested personally in the suit itself.—[The *Lord Chancellor* : As an individual member of the corporation, he objects to the interlocutor of the Lord Ordinary holding the pursuer entitled to maintain the suit. Is not that claiming protection for himself in his individual character, and has he not a right to such protection ?]—He has no right to pray for a general reversal of the decree.—[The *Lord Chancellor* : May he not ask for it to be reversed so far as he is concerned ?]—He may not ; he has no such interest in the matter as to entitle himself to make such a demand. Incorporation makes several persons to be considered, in law, but as one, and in an action against a corporation, no member can have an individual interest. *Erskine's Institutes* (*f*). But even if a party can appeal on the ground of being liable to costs, the form of action in this instance creates no such liability as against the Appellant. There must be a due service of the summons. If the action is against a corporation, the service of the summons may be made at a corporate meeting, on the clerk of the corporation present at the meeting ; but if there should be no corporate meeting, then the summons may be properly served on each member of the cor-

(*f*) Tit. 7, s. 64 ; vol. 1, p. 168.

corporation. But that does not create a personal liability in each member; nor does the naming of each member create any such liability. In this case the execution of the writ of summons states it to have been “delivered to the Lord Provost for himself, and on behalf of the Lord Provost and council, when they were met in the ordinary place of meeting, with the names and designations of the indwellers of Glasgow, who were witnesses of the premises;” so that the Appellant here, was not, in fact, served at all. There was no individual defence to this action; the defence was for the Lord Provost, magistrates, and town-council of Glasgow. No individual member can be liable to the performance of this contract, sought to be enforced in this suit; no one, in fact, could have the power to perform it. The contract was with the corporation, and the breach complained of is, that the corporation did not perform it. There is no authority to show that the merely naming a party in a summons of this sort, will make him personally responsible on it; that must depend on the nature of the action, and the nature of the action here is entirely different from one where personal responsibility is sought to be enforced. The passages cited from Darley’s Practice and the Book of Styles, only show that the names of the members of a corporation need not be in all cases inserted in the summons, but do not prove that if inserted, each individual member of the corporation becomes liable to the action. Then, as to the case of *Boyd v. Cunningham* (g), it is clear that there the party had been guilty of a personal misfeasance; but that case can have no application to a case of a breach of a contract entered into with a corporation. The case

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of *Bryson v. The Corporation of Glasgow* (h) depended on the terms of particular Acts of Parliament, and is therefore inapplicable here.

The *Lord Chancellor* :—This is a claim against the members of the corporation of Glasgow, in respect of funds of which they are trustees. The summons is made against them as a corporation, and then come the names of all the members, and these words, “for themselves, and as representing the burgh and community of Glasgow, ought and should be decerned,” &c. to make payment. It seems to be acknowledged that it is not an unusual practice in the courts of Scotland to name individual members of a corporation; but there is no case in which they have been named in this manner, nor is there anything to show how they, in their individual capacity, are liable here. They are not individually called on to make a defence, nor is the claim made against them as individuals. Notwithstanding this odd way of stating the summons, it is not understood that the pursuer charges that they appear to be interested personally in the matter; and the interlocutor of the Lord Ordinary takes no notice of them as individuals, but treats them as a corporate community, in whom trust funds are vested in the usual way. The interlocutor of the 21st of February 1837 does so, and finds “that the agreement libelled between the pursuer and the defenders is in due conformity with the trust deed of the late Dr. Bell, and a valid and effectual agreement, and therefore decerns against them in terms of the conclusions of the libel.” The decree then goes on to give costs. The sole question is, whether, in this state of the proceedings, the

(h) 1 Shaw & Dunl. 156.

present Appellant is individually liable for that which this interlocutor directs to be paid to the pursuer. If not, he cannot come here and appeal against a decree merely as a member of the corporation. As an individual he is not interested in this matter, and could not, as an individual, bring here the concerns of the corporation. I should wish to take this opportunity of considering the effect of these proceedings, to see whether they can be enforced against him personally, for it is clear that if he is not personally liable, he cannot have any right to appear here as an appellant.

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Judgment postponed.

The *Lord Chancellor* :—My Lords, there was a case Aug. 16, 1838. which came before your Lordships some time since, upon a question of competency. The case arose upon a certain sum of money transferred to certain parties for the purpose of encouraging the establishment of schools in several of the large towns in Scotland. Certain sums were assigned to the town of Glasgow for that purpose, and the old corporation of Glasgow thought of carrying it into effect by making a division of that money, and appropriating it to certain kirk-sessions of several of the parishes of the town. That was not allowed by the individuals who constituted the new corporation, and they withheld the payment from those kirk-sessions, which gave rise to a suit by one of the kirk-sessions, for the purpose of recovering payment of what they considered to be due to them. My Lords, the question turns entirely upon the form in which that suit was instituted, which was followed by an interlocutor of the Court of Session giving relief in the terms of the summons.

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My Lords, the summons prayed that the corporators of Glasgow, by their legal designation, and also the various persons constituting the town-council of Glasgow and specially and individually named in the summons, and amongst others John Boyle Gray, who is the party appealing to your Lordships' House, "for themselves, and as representing the burgh and community of Glasgow," should be desired to pay that portion of the money which the kirk-session thought they were entitled to receive, and that they might also pay the expenses which had been incurred in the attempt to recover it. My Lords, when that case came before the Lord Ordinary, an interlocutor was pronounced, declaring the agreement *ultra vires*, and repelling the action. That interlocutor was afterwards reversed on a reclaiming note to the First Division of the Court of Session; and the interlocutor, as finally made by the Court of Session, was as follows: "That the agreement libelled between the pursuers and defenders is in due conformity with the trust deed of the late Dr. Bell, and a valid and effectual agreement, and therefore decern against the defenders in terms of the conclusions of the libel; find the defenders liable to the pursuers in expenses, and remit the account thereof, when lodged, to the auditor of court to tax the same, and report with this declaration, that no part of the expense of this litigation shall form a charge on the trust funds of Dr. Bell."

My Lords, the corporation of Glasgow has not appealed against that interlocutor; so far, therefore, as the corporation was made defender in that suit, there is no question before your Lordships. But one of the town-councillors, one individual member of the corporation, namely, the present Appellant, Mr. Boyle Gray, has presented an appeal against the decree of the

Court below. A counter-petition has since been presented by the Respondents, alleging that it was not competent to that individual to appeal against this interlocutor. The real question is, whether there is anything in the interlocutor pronounced which gives Mr. Boyle Gray a right of appeal.

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My Lords, the case was argued at your Lordships' bar, and it was contended that he had a right to appeal as to the whole merits of the interlocutor. Another ground contended for was, that he had a right to appeal, because he was subject, personally and individually, to costs and responsibilities, by the terms of the interlocutor pronounced. On the other hand it was insisted, that this is the usual form of proceeding against corporations in Scotland; that it is usual, not only to name the corporation, but to name the individual members of the corporation; and the reason of that was stated to be, because, if the pursuers failed in finding the corporation sitting in their corporate capacity, in that case the pursuer would have a right to serve the officer presiding at that meeting, and if he could not find him in that situation, then the only way that he had of bringing the matter before the court was by serving each individual member constituting the corporation, and therefore it was alleged that a practice had prevailed in Scotland of naming the individuals who constituted the corporation, and undoubtedly there appears to be some authority for that proposition. But to that it was answered, that if that were so, the individuals should be named as constituting the corporation; whereas, in the summons here, they are named, and then it is prayed that they, "for themselves, and as representing the burgh and community of Glasgow," might be ordered to pay the sum of money claimed by the pursuers;

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and although the interlocutor does not in terms repeat those expressions, yet the interlocutor declares the finding to be in the terms of the summons. Your Lordships, therefore, must consider that the interlocutor adopts the terms of the summons, and that the interlocutor appealed from, is an interlocutor which not only gives judgment against the corporation as such, but, after naming the individuals as parties to the suit, it gives judgment against them “for themselves” as well as “representing the burgh.”

Now, my Lords, if your Lordships should be satisfied, as is contended on the part of the pursuers, who are Respondents in this case, that it would not subject Mr. Boyle Gray to any personal responsibility, your Lordships probably would be of opinion that it was not competent for him to appeal; but I confess, upon looking through the papers, and on referring to the authorities which have been cited, I cannot satisfactorily come to that conclusion. The whole proceeding is very different from that which prevails in this country. If it be the practice in Scotland to name the particular individuals, it cannot be necessary to name them as component parts of the corporation, except to pray relief against them for themselves, as well as representing the corporation.

My Lords, in the papers printed by the Respondents, they refer to one case (i) in which it was held that the individual members were responsible, but not upon a summons of this kind, and they quote this as proof that, according to the terms of this interlocutor, the individual members of this corporation would not be responsible. Now the way in which the interlocutor was framed in that case, which they say made the ma-

(i) *Burgesses of Rutherglen v. Leitch*, 8 July 1747.

gistrates, the members of the corporation, individually responsible, was this, as against the magistrates, “not only as magistrates, and as representing the community and burgh, and their successors in office, but they, as individuals, and their heirs and representatives, ought to be decerned,” &c.; and the Respondents contend that only on a summons so peculiarly framed, would an interlocutor of this sort make them responsible. Now the distinction between calling on them “as individuals” and as parties “for themselves as well as representing the burgh,” is undoubtedly very fine. The fact that, under the former description, each member would be liable, does not show that he would not be so under the latter; no authority is quoted for the purpose of showing that that variation of phrase would make any difference in the liability of the parties. My Lords, therefore, I cannot say that I am at all satisfied that there is nothing in this interlocutor which can affect the individual who is now appealing, and if your Lordships should be of that opinion, then it will be a matter of course that the party should be permitted to come to your Lordships’ bar for the purpose of asking for some variation in the form of that interlocutor.

But, my Lords, I am anxious that the party appealing should not be induced to indulge any false hopes of success in that which appears to be the main point of his contention, because your Lordships do not think it expedient to dispose of this case on a question of competency. He comes here wanting, he says, to relieve himself from his personal responsibility, but he also comes here for the purpose of discussing the question which has been decided in the Court below, between the kirk-session and the corporation of Glasgow. Now I do not enter into that part of the

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case; it is probable that your Lordships may have that to consider at another time; but nothing which your Lordships may do upon this question of competency ought to encourage any expectation in favour of the appeal, which he, as an individual member of the corporation, is bringing to your Lordships' bar, for the purpose of raising a question, not as affecting himself individually, but as affecting a question between the pursuers, the kirk-session, and the corporation of Glasgow, of which latter body he is only an individual member. My Lords, all that your Lordships have at present to do, is to consider whether the case is so clearly made out, that the individual in question is not liable to any responsibility from the interlocutor which has been pronounced, and whether your Lordships can safely dismiss the case from your bar, as being a case in which the party is not competent to bring the interlocutor of the Court below before you on appeal. My Lords, I come to the conclusion that there is evidence that he may be individually responsible, and consequently that that which the Court of Session has done is sufficient to entitle him to come here in respect of that personal liability.

My Lords, I should have stated that the interlocutor of the First Division of the Court of Session, not only decrees the payment to the kirk-session of certain sums of money, and that as against the defenders generally, but it directs the payment of expenses, and then provides that those expenses shall not, on any account, come out of the charity fund devoted by Dr. Bell to the establishment of those schools. It appears, therefore, that whoever may come under the denomination of defenders, must be the parties who are to pay the money, and who are to pay the expenses; and your Lordships find, not only the corporation de-

scribed as defenders, but the several individuals who are named, being the individual members constituting the corporation, are likewise so described. My Lords, under these circumstances, it appears to me that the only safe course to take would be to dismiss the petition which prays that the appeal may be dismissed as incompetent; but as the same question may come on to be heard again, and as it is uncertain what may then be brought under your Lordships' consideration, or to what conclusion your Lordships may then come, I think that the right course would be to reserve the costs till the case be heard. If the party does not think fit to prosecute the appeal, then the other party will apply to your Lordships for the costs attending this petition.

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Judgment for the Appellant on the competency of the appeal.

The following order was afterwards entered on the Journals. After reciting the petition of the Respondents to dismiss the Appellant's petition, it was "Ordered, that the said petition be dismissed, and that the said appeal be sustained; and that the costs be reserved until the hearing of the said appeal."—Lords' Journ. 1838, p. 743.

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March 27.
April 2, 3.

A P P E A L

FROM THE COURT OF SESSION.

AGNES TAYLOR, otherwise JOSEPH - - *Appellant.*

Dr. JAMES HOSSACK and Others, Exe-
cutors of Lieutenant-Colonel JOHN } *Respondents.*
TAYLOR, deceased - - - - - }

*Marriage
Contract.
Annuity.*

In a marriage contract, the husband covenanted to secure to his intended wife the benefit of the pension or annuity payable from a certain fund to the widow of a subscriber, "and failing thereof, or in case the said pension or annuity, from whatever cause, shall not be available to his promised wife, excepting only through her right to and possession of property producing the amount of the pension, he bound himself, his executors," &c. to make payment to her of a clear yearly sum equal to the pension. At the time of his death he had secured his wife a pension on the Bombay Military Fund to the amount of 365 *l.* a year. From different causes (other than her possession of property producing the amount of the pension) the payment of the pension was at first reduced, and afterwards stopped. HELD that the contract was an absolute contract to make good the amount of the pension in every case but that of the possession of property producing a similar amount, and that event not having happened, the husband's estate was declared liable.

IN this case, Mrs. *Agnes Taylor*, otherwise *Joseph*, had instituted a suit in the Court of Session, calling on the present Respondents, the executors, &c. under her late husband's will, to make good to her certain annual payments which she alleged were secured or

intended to be secured to her under the will of her late husband Lieutenant-colonel *John Taylor* deceased. The Appellant was the daughter of a Mr. *John Forlong*, of *Wellshot*, near *Glasgow*, and in 1822, being at that time a little more than 17 years of age, received proposals of marriage from Major *John Taylor*, then in the Honourable East India Company's Service. The proposals became the subject of discussion on the part of Mr. *Forlong* as to the settlement that was to be made on his daughter. Major *Taylor*, in a letter, stating his then present means and expectancies, fully explained himself, and among other means of providing for his intended wife, in case of his death, mentioned a pension that would be payable to her from the Bombay Military Fund, to which he was an original subscriber. In order to render the matter clearer, he sent a copy of the East India Register, which contained an account of the Military Fund referred to in the above-mentioned letter, and in which, under the head of "Abstract of the Regulations," there was the following provision specifically referred to by Major *Taylor*:—"The widows and legitimate children of deceased officers, whose income may not exceed one-half of the specified pension, shall be entitled to receive the following annuities, viz.:—

"Widows during their widowhood, and not otherwise,					£.	s.	d.
"Of a colonel	-	-	-	-	456	5	-
"Of a lieutenant-colonel or member of the medical board	-	-	-	-	365	-	-
"Of a major, senior chaplain, or senior surgeon	-	-	-	-	273	15	-
"&c.							

There was in the same Register, and at the same

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place, the following statement, under the head of
 “Deductions from widows’ pensions :”—

“1st. The amount received from Lord Clive’s
 Fund.

“2d. All income above half the amount of the
 pensions.

“Widows possessing the income specified against
 the rank of their late respective husbands are pre-
 cluded altogether from claims upon the fund.

	£.	s.	d.
“The widow of a colonel - -	684	7	6
— lieutenant-colonels, &c.	547	10	-
— Major, &c. - -	410	12	6.”

Another of the regulations of the *Bombay* Fund
 was as follows :—

“Should the fund at any period fall short of the
 demands upon it, so that the annual income will not
 defray the amount of the annuities and other claims,
 then it shall be in the power of the directors to make
 a proportional deduction from the annuity of each
 annuitant until the state of the funds shall afford
 the means of complete payment, when if a surplus
 income exists, the arrears shall be made good from
 the amount of the surplus, but not otherwise.”

A formal marriage contract was afterwards exe-
 cuted, bearing date the 2d August 1822, the parties
 thereto being the pursuer and her father on the one
 side, and Major *Taylor* on the other. That contract
 contained the following stipulations :—“In contem-
 plation of which marriage, the said *John Taylor*
 hereby binds and obliges himself, his heirs and suc-
 cessors, to do and perform all and whatever may be
 necessary and incumbent upon him as a subscriber
 to the *Bombay* Military Fund, to secure to his pro-

mised wife, in the event of his predeceasing her, the benefit of the pension or annuity payable from the said fund to the widow of a subscriber, according to the rank he holds or shall hold in the Company's army for the time; and failing thereof, or in case the said pension or annuity, from whatever cause, shall not be available to his promised wife, in the event foresaid, saving and excepting only through her right to, and possession of such separate funds as, by the rules and regulations of the said fund, would exclude her from all benefit thereby, then the said *John Taylor* binds and obliges himself, his heirs, and successors, to make payment to the said *Agnes Forlong*, his promised wife, in the event of her surviving him, of a clear yearly jointure or annuity equal to the pension that has hitherto been paid or shall be payable from the said fund to the widow of a subscriber holding the same rank in the army which now belongs or shall belong to the said *John Taylor* at the time of his death, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of said jointure or annuity at the first term of Martinmas or Whitsunday that may happen after the said *John Taylor's* death, and so on thereafter half-yearly during her life, with the lawful interest of the said termly payments from the time that the same becomes due until payment, and a fifth part of each termly payment, in name of penalty, in case of failure in the punctual payment thereof, besides the payments themselves; declaring that, in the event, and so long as the said *Agnes Forlong* shall draw or receive from the said military fund, a pension or annuity equal to the pension that has hitherto been paid, or shall be payable therefrom, to the widow of a subscriber holding the same rank which now be-

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longs or shall belong to the said *John Taylor* at the time of his death, or would have been entitled to draw and receive such pension or annuity had she not possessed such separate funds as, by the rules and regulations of the said fund, exclude her from all benefit thereby, as is before provided; the personal obligation hereby undertaken by him shall be suspended, aye and while she is provided as aforesaid from the said fund, or has lost the benefit of the fund, from the cause above referred to. And for a provision or jointure in favour of his promised wife, in the event of her surviving him, the said *John Taylor* hereby assigns to the said *Agnes Forlong*, the benefit of the pension or yearly annuity to which she may be entitled as his widow, from the said fund as aforesaid; and also the benefit of the pension or annuity payable from any other fund to the widow of an officer of his, the said *John Taylor's* rank, in the service of the said Honourable East India Company, and that agreeably to the rules and regulations of the said fund or funds respectively; and likewise all right, title, and interest in the provisions secured to the said *Agnes Forlong* by her father, as after mentioned."

The marriage took place in *August* 1822. Major *Taylor* went out with his wife to *India*, and there attained the rank of Lieutenant-colonel. He died on the 10th of *September* 1828, leaving one daughter, the issue of the marriage.

On the 15th *August* prior to his death, Colonel *Taylor* executed a last will and settlement, whereby he constituted the Respondents his joint executors in *Britain*. By the said will he bequeathed, under certain limitations and provisions, his whole property (which was estimated as being from 12,000 £ to 15,000 £.) to his child, and failing her, to his own

sisters. He bequeathed no part of it to his wife, on the ground stated in the following sentence in his will :—“ No provision is herein made for my wife, *Agnes Forlong*, she being already amply provided for, by the marriage contract, signed and sealed at Wellshot House in August 1822, and now in the hands of Messrs. M'Gregor & Company of Glasgow, and William Buchanan, esquire, respectively.”

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At the date of Colonel *Taylor's* death, the annuity or pension stated in the regulations of the Bombay Military Fund, as due to the widow of a lieutenant-colonel, was 365 *l.* per annum, and the Appellant accordingly claimed this annuity, conceiving herself entitled to the full amount thereof.

On making application, however, to the agents of the fund, the Appellant was informed that a deduction must be made from the said annuity of the sum of 91 *l.* 5 *s.* yearly, on the ground that, by one of the regulations of the fund, “ the annuity payable to the widows of subscribers is, in all cases, to be subject to a deduction equal to the amount of Lord *Clive's* pension;” and that the *Clive* fund pension, in the pursuer's case, amounted to the said sum of 91 *l.* 5 *s.* A fund, entitled “ Lord *Clive's* Fund,” did, in point of fact, exist, in whose regulations this amount was stated as the pension of a lieutenant-colonel's widow; but by the same regulations, it was provided that, where the husband died possessed of property above the value of 3,000 *l.*, the said pension should not be payable. In consequence of her husband leaving a greater fortune than this amount, the Appellant had never received the pension from Lord *Clive's* fund, or any part thereof. Notwithstanding which, the agents of the Bombay Military Fund deducted the amount of

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91 *l.* 5 *s.* from the annuity of 365 *l.* payable to the Appellant, and only paid to her the balance.

The Appellant afterwards applied to the Respondents, as her husband's executors, to make up to her, in terms of the marriage contract, the deficiency of 91 *l.* 5 *s.* annually, arising on the annuity stipulated to be secured to the Appellant.

In the course of the year 1831, a farther reduction was made on the Appellant's annuity by the directors of the fund. It appeared that the resources of the Bombay Military Fund had become insufficient to pay the pensions at the rates which had been calculated, and a remit had been made to Mr. *Davies* of the Guardian Insurance Society in *London*, to investigate the subject, who reported, that the society's resources "are not adequate to provide for the benefits held out by the present regulations." By a minute dated 22d *January* 1831, and intimated to the Appellant on 9th *June* of the same year, the directors of the fund resolved on certain reductions of the scale of annuities, as being necessary in consequence of the report made by Mr *Davies*. The annuity to the Appellant was therefore reduced from the nominal sum of 365 *l.* to 250 *l.*; and from this was also deducted the alleged amount of the *Clive* fund pension of 91 *l.* 5 *s.*, leaving only 158 *l.* 15 *s.* actually drawn by the pursuer, in place of 365 *l.* since 30th *April* 1831, at which date, and 31st *October*, the pensions from this fund were payable, by half-yearly portions.

The Appellant also applied to the defenders, as Colonel *Taylor's* executors, to make up to her the deficiency of 115 *l.* per annum, arising out of this new deduction.

In consequence of the Appellant's second marriage

the directors of the Bombay Military Fund ceased to make any payment to her. She also applied to the Respondents to make up this loss from her late husband's estate.

As they refused to make good any of these losses, she instituted the suit in the Court below. The case was heard before the *Lord Ordinary* on the 11th of *July* 1835, when he pronounced the following interlocutor: " Finds, that upon a just construction of the marriage contract libelled, the pursuer is entitled (except in the special case therein expressly excepted) to a free yearly jointure or annuity out of the funds and estate of her late husband, of such an amount as, along with what she may draw from the Bombay Military Fund, shall make up an annual allowance of 365*l.*, and that for all the days of her natural life, and whether she shall or shall not inter into any second or other marriage, and therefore repels the defences, and declares and decerns in terms of the conclusions of the libel."

This interlocutor was brought before the Judges of the Second Division of the Court of Session, who referred it to the whole fifteen Judges, and in accordance with the opinion of the majority, subsequently pronounced a decree, declaring that " the executors are bound to make up any deficiency in the pension or annuity payable to the pursuer (the present Appellant) from the Bombay Military Fund arising in consequence of her second marriage, *quoad ultra*, alter the interlocutor complained of, and sustain the other defences." Cross appeals were presented against this decree, *Mrs. Taylor* insisting that she was entitled to have every deficiency in the annuity, from whatever cause it arose, made good to her out of her husband's estate, while the executors complained of that part of the decree which declared that they were bound to make

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up the deficiency arising in consequence of the second marriage.

Sir *W. Follett* and Mr. *Macneill*, for the Appellant:—The contract of marriage to secure a certain sum to the Appellant is an absolute contract, and gives the Appellant the right to have the sum thereby secured made up to her free from all deduction. The husband's estate is bound to make good the annuity, whatever may be the cause which puts an end, either in the whole or in part, to the pensions intended to be secured on the Bombay Fund. The settlement itself uses the very expression "in case the said pension or annuity, from whatever cause, shall not be available to his promised wife." Her second marriage does not affect a right so strongly secured to her. This is shown the more clearly by the exception which follows: "Saving and excepting only through her right to and possession of such separate funds as, by the rules and regulations of the said fund, would exclude her from all benefit thereby." The introduction of this special exception excludes all others. The partial insolvency of the fund, and the consequent diminution of her annuity, cannot affect her right; on the contrary, it must be taken to be one of the very events against which the husband meant to provide by the settlement. In consideration of this settlement the Appellant expressly renounced all other claims which, by the law of *Scotland*, she might have against her husband's estate. This was a valuable consideration for the settlement, and justifies the construction put on it by the Appellant. The amount of property of which the husband died possessed cannot affect the argument in any way whatever, for the Appellant's right on the terms of the settlement is here

denied ; so that if that argument is right, she would not be entitled to have the pension made good, though the husband, instead of dying worth only a few thousands, had died worth 100,000*l.* At the time of the will being made, it was known in *India* that the Bombay Military Fund had partially failed. Yet there is not, in letters or otherwise, the slightest indication of a desire on the part of the husband to prevent the liability which had, on that account, attached on his property to make good the loss thus likely to occur in the amount of her pension ; and on the contrary, in that will itself, he speaks of his wife as amply provided for by the settlement, which could not be the case if that settlement was not intended to make good to her deficiencies in the payments from the Bombay Fund, which had even then become unable to meet in full its settled engagements.

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Mr. Serjeant *Spankie*, and Mr. *Biggs Andrews*, for the Respondents :—The contract here is one which must be considered with reference to the manifest intention of the parties. Now, what was that intention ? It is to be gathered, in a great measure, from the letter of Major *Taylor* to the lady's father, containing his explanation of what he should be able to do for the lady. In that letter he says, "I am perfectly willing that every farthing you or Mrs. *Forlong* may leave your daughter shall be at her own free disposal, provided you do not bind me down to any settlement in addition to the Military Fund, as it would only injure me without in the smallest degree benefiting your daughter." The settlement was made on the understanding expressed in that letter, and the lady's interest was best consulted by leaving her husband's property free to a certain extent, since a consi-

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derable settlement from him would only have lessened her claim on the Bombay Fund, and her pension on the Bombay Fund being secured, it left him at liberty to increase the property that was to go to the children of the marriage. It was his object to provide for his widow from the fund, and for his children from his property. He has died possessed but of a small property, and if the Appellant should succeed in this suit, his whole intention will be frustrated, and the issue of the marriage will be left unprovided for. It is clear that the parties contemplated no charge on the husband's estate, which otherwise would have been burdened, not to increase the amount of the widow's income, but to take that income out of the husband's property, instead of taking it out of the Bombay Fund, to which he had been so long a subscriber. Such a course was manifestly contrary to the interests of all parties, and therefore never could have been intended. The words of the contract are not in themselves absolute, and construed, as they ought to be, with reference to the plain intention of the parties, they cannot justify the fixing on the husband's property the charge now sought to be imposed on it, by which the fund provided for the issue of the marriage will be materially diminished. It is, at all events, clear, that the Appellant is not entitled to receive, out of her late husband's estate, that which she has lost in consequence of her second marriage. That was her own act. She knew the regulations of the Bombay Fund, and must therefore be considered voluntarily to have surrendered her claim to the annuity. If the Appellant has not by her second marriage forfeited all right to the fund and (that cause of forfeiture being her own act) all claim on her husband's estate to make good that loss, then it is at least on the terms of the instru-

ment itself that no liability exists while any part of the fund is available, but that the whole payment from the fund must have ceased before the husband's estate can be called on to make good the deficiency. And even then the failure must not have been occasioned by the act of the party. Again, the Appellant is, by the terms of the contract, entitled only to be secured to the extent of "the benefit of the pension payable from the said fund." Now, from these words, it is clear that the deed was only intended to provide against the case in which the pension, being payable, was not duly paid; but here the pension has, by the Appellant's own act, ceased to be payable. It is clear, therefore, that the case which has now arisen does not fall within the terms of the contract; or it may be contended, upon this clause, that while the Appellant receives any annuity whatever, which is payable from the fund, the husband's estate is not liable, and that the payment must altogether cease before the liability arises. The settlement was only a collateral security, in the event of the total failure of the pension; and that event not having occurred, the Appellant is not entitled to come on her late husband's estate for anything.

The *Lord Chancellor*:—The questions in this case April 3. are, first, whether, as the widow has partly lost the benefit of the Bombay fund in consequence of the failure of that fund, she is entitled to have the amount of that loss made good to her out of her husband's estate; secondly, whether, as her second marriage has suspended during the continuance of that marriage her claim on the Bombay fund, she is entitled to come on her husband's estate to have the loss thus occasioned made up to her; and, thirdly, whether she is entitled to come on his estate to supply the deficiency

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arising from the non-payment of her supposed claim upon the Clive fund. The contract itself provides for the payment of what she is to receive from her husband's estate, in these terms: (His Lordship here read the provision in the deed of settlement.) The Regulations, which had been brought to the knowledge of all parties, showed that the pension from the Bombay fund was only to be received during her widowhood; that was distinctly stated in the most express terms. In consequence of that, it is now said that there can be no charge on the husband's estate, to make good what she has lost by her second marriage. Yet the contract entered into between these parties was not merely for the period of the widowhood, but for life. The parties were well aware that that which was to be lost was the pension from the Bombay fund by the termination of the widowhood. The husband himself especially knew this, and yet entered into the contract expressly for her life. He has contracted in a way to meet all but one case, which has not happened, namely, that of her possessing property or income to a larger amount; and his contract is, subject only to that one exception, that he will pay her for her life a sum equal to the annuity she was to be entitled to receive from the Bombay fund. This contract itself is quite clear from doubt. The act which causes the loss of the Bombay fund is that of the wife herself; but if the parties have so contracted as I have stated, that is their affair, and they must take the consequences. They have contracted, that if the fund fails from any cause whatever, except one (which one particular cause has not occurred), the payment shall be made. So that the inference is, that they intended to provide for that which has happened. It is true, that in the Court below there

was a difference of opinion as to the right of the widow to claim the benefit under the settlement, because of the act which occasioned the loss being her own act, but I cannot see any good ground for the opinion of some of the Judges on that point; and for the reasons I have given, I think that all causes of loss, except the one particular case reserved in the settlement, were intended to be guarded against by this contract.

The next point is, how far the husband's estate is to be held liable to make up the loss which has arisen from the partial failure of the fund, on account of its not being found adequate to the payment of the sum originally calculated as payable to the widow on her husband's subscription to the Bombay fund. The language of the undertaking is not so clear on this part of the case as it might be. Still on looking at the whole of the contract stated, I am satisfied as to the conclusion at which I must arrive. The language is, "and failing thereof," (that is, in case the husband does not keep up his payments to the fund,) "or in case the said pension or annuity, from whatever cause, shall not be available to his promised wife in the event aforesaid, saving and excepting only through her right to and possession of such separate funds, then the said *John Taylor* binds himself to make payment to the said *Agnes Forlong* of a clear yearly jointure or annuity equal to the pension that has hitherto been paid to the widow of a subscriber holding the same rank in the army as shall belong to him at the time of his death." Stopping there, it is clear that the payment is to be made on the failing of it, from whatever cause. If the funds so failed as to produce nothing, then the argument is that the liability would arise; but it is said, that the words mean a failure to the full extent of the sum intended

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to be secured, and cannot be construed so as to apply to a case where the fund becomes unavailable only as to part. This does not seem to me to be a reasonable construction. Though the words "not available" may bear the construction which was put on them in the Court below, and though these words are not perhaps the best that could have been used to express the meaning of the parties, yet can it be said that the fund is not unavailable for that purpose which the husband undertook to supply? What is that purpose? It is the payment of an annuity equal to that of an officer holding the rank which Major Taylor might hold at the time of his death. Then look to his undertaking, and see what it is; and it is plain that it is an undertaking to supply any deficiency in the payment of such annuity. But it does not rest there; for when we come to the other clause, which is to exonerate him in certain events, we see by the extent to which he is to be exonerated what is the extent to which he is to be liable. He himself declares the extent of his legal liability to be so long as she receives the pension, in which event his estate is to be exonerated from this obligation. Has she received the pension? She has not. Then the liability must be that which he, having provided this annuity, intended that she should have the benefit of, namely, the amount of that annuity during her life; and this benefit must be secured to her, from whatever cause the payment of the annuity should fail. There is an expression in the deed of settlement, that its object is to secure to the wife the benefit of an annuity "payable from the said fund;" and on this it has been argued, that while she receives whatever annuity is payable from the fund, his estate is not liable. Such a construction would be very extraordinary; for though

the fund is liable to be reduced from time to time to a very low amount, the husband's estate would, so long as any fraction of the annuity was payable from it, be spared from liability. That would defeat the whole object of the settlement. There is, however, one way in which these words might receive a reasonable construction. The husband, at the time of the marriage, was a Major. He expected to receive the next step in the army. He provided, therefore, that his liability should be, to pay a sum equal to the pension which had hitherto been paid to the widows of subscribers to the fund, whose rank in the army was the same as might belong to him at the time of his death. That provides for a future event, and the words I have just read may be considered as inserted for such a purpose. The objection to this construction is, that the words would be unnecessary for such a purpose, because it would be provided for in other parts of the deed. But if unnecessary, that at least will not vitiate the construction. Another construction has been put on these words that would lead to the same conclusion, namely, that the parties contemplated not the reduction on the amount of the annuity payable, but on the amount of the annuity actually paid. It was intended that that amount should be paid, but it was considered that the fund was, like all others, liable to diminution. It is possible that the husband intended to guard against such an event, and therefore made a settlement that would keep it up. That would put a rational, and not an unnatural construction on the clause. This event has actually taken place; for there has been, not a diminution of the annuity payable, not a reduction from what she is entitled to receive; no alteration in that respect, for that was the subject of a positive contract;

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but there has been a reduction through a power which necessity has imposed on the directors of the fund the duty of exercising, if such power did not exist in the regulations of the fund, which declared, that if the income of the fund would not bear the sums payable out of it, there should be a reduction made in the payment from the fund; that there should be a certain sum only paid until the funds should afford the means of a complete payment; and that if any surplus should afterwards exist, the arrears should be made good from such surplus. That fact much diminishes the importance of the question arising on these words. The event so contemplated has not arisen; there has not been a diminution in the money payable, but in the amount paid, and what is here undertaken is to make good what shall be paid or payable. Now what is payable is a sum of 365*l.* a year; so that even if the construction prevailed which is not the natural construction, the only event against which the settlement does not offer a security has not happened, and the plaintiff's estate has not been redeemed from the obligation as to the rest. Therefore, in any way of construing this contract, it is clear that the husband intended to contract that in all the events which might cause a diminution of the fund, except the one case specified, which is not now in question, his estate should make good the annuity of 365*l.*

There is one other ground of objection which yet remains to be considered, and that is the diminution arising from the regulations of the Lord Clive fund. I do not find any allusion to it in any of the observations of the Judges in the Court below. It is not contended that she could have received this 91*l.*; her husband left a property of more than 3,000*l.*, and therefore she could not receive it; but it is quite

clear that a reduction equal to what she might receive from the Clive fund, was properly made from the Bombay fund. If that is so, this is a failure which has caused the pension to that extent not to be available to the wife. If therefore the right construction of the contract be, that the husband is to make good the failure of the amount of the annuity from whatever cause; this is a failure from a cause affecting the annuity, and consequently the husband's estate is bound to make it good. This case has been attempted to be met on the ground that the whole of this was merely meant as a security for the existence of the pension itself. If it was merely meant that the husband should covenant for the security of the pension, that might have been easily done. But he provided for a number of things which had nothing to do with the security of the pension, for he covenanted against several circumstances which could not affect that security. He covenanted to make good the annuity in all events but one, and he therefore went much further than would have been necessary had he entered into a mere covenant of title as to the security of the pension. I am of opinion that he covenanted to make good any deficiency in the annuity intended to be secured to his wife. To that effect was the interlocutor of the Lord Ordinary, and I move your Lordships to restore that interlocutor.

Sir *W. Follett* applied for costs.

The *Lord Chancellor* :—This an order merely varying the decree of the Court of Session; in such a case costs cannot be given.

Interlocutor of the Court of Session varied accordingly; and “the cause remitted to the Court of Session, to do thereon as shall be just.”

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APPEAL

FROM THE COURT OF CHANCERY.

1837 :
June 28, 29, 30.CHARLES SCARISBRICK - - - - - *Appellant.*1838 :
Feb. 13.
July 24.

MARY ECCLESTON, EDWARD CLIFTON and ELIZABETH his Wife, THOMAS CLIFTON an Infant, and the Rt. Hon. EDWARD LORD SKELMERSDALE and the Rev. STREYNHAM MASTER	}	<i>Respondents.</i>
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*Will.
Shifting
Clauses.*

A testator, having seven children, born in this order, *Thomas, Ann, Mary, Elizabeth, Catherine, William, and Charles*, devised all his real estates to trustees, in trust, as to his S. estate, to settle and convey it to *Thomas* for life, and to his first and other sons in tail male, with like limitations in remainder to *William* and *Charles*, and every subsequently born son of testator successively, and their respective first and other sons; remainder to the first and other sons of *Thomas* successively in tail; with like remainders to the first and other sons of *William, Charles*, and every subsequently born son of testator; remainders to the first and other daughters of *Thomas, William, Charles, &c.* respectively and successively in tail; remainder to *Ann* for life, and to her first and other sons successively, first in tail male, then in tail general; remainder to her daughters in tail; with similar remainders to *Mary, Elizabeth*, and *Catherine*, and every subsequently born daughter of testator in the order of her birth, and their respective sons and daughters in succession; the settlement to provide that *Thomas* and every person becoming entitled to said estate should take the name and arms of S. only, with cesser of the uses to such person on refusing or discontinuing to use them: And as to testator's W. estate, to settle and convey it to his sons and daughters born and to be born, and their issue, in the same manner, except that *William* was to take first, and *Thomas* last, of the sons, and *Thomas's* second and other sons before his first; and also that *Mary* was to take first of the daughters, and *Ann* last; the settlement to provide that if *William* or *Charles*, or any subsequently born son of testator, or his daughters, *Mary, Elizabeth*, and *Catherine*, or any subsequently born daughter, or any issue of his said sons or daughters, should become entitled to S. estate, and any younger son or daughter of testator, or any issue of such younger son or daughter, should be then living, the uses in the W. estate to the child, who or whose issue should so be-

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come entitled, should cease; but if that estate should have shifted to *Charles*, or any of testator's subsequently born sons, or to *Elizabeth* or *Catherine*, or any of his subsequently born daughters, or any issue of the respective bodies of his said sons or daughters, and there should be failure of issue of all his sons or daughters, younger than the son or daughter, from whom or from whose issue the same should have shifted, then the said W. estate should remain to the uses to which it would have gone if there were no proviso for shifting: and that every person becoming entitled to W. estate, except *Thomas* and his issue, should take the name and arms of D. only; with cesser of the uses in said estate to such person on refusing or discontinuing to use them; and the same to go to the person next beneficially entitled: And as to E. estate to settle and convey it to testator's sons and daughters and their issue in the same manner as the S. estate, except that *Charles* was to take first, then every subsequently born son; *Thomas*, the eldest, next, and then *William*, and their respective issue in the same order; and that *Elizabeth* was to take first of the daughters, then *Catherine*, any subsequently born daughter next, then *Ann*, then *Mary*, and their issue respectively in the same order; the settlement to provide, that if *Charles* or any subsequently born son, or *Elizabeth* and *Catherine* or subsequently born daughters, or any issue male of said sons or daughters, should become entitled to the W. estate, and *any younger son or daughter*, &c. (as in the W. shifting clause), but if the said estate should have shifted to any of the other sons or daughters of testator, &c. (as in the W. reverter clause).

THE settlement was to contain powers to tenants for life of S. estate to jointure and charge portions, and like powers to like tenants of the W. estate, (except *Thomas*), and of the E. estate, (except *Thomas* and *William*); and limitations for preserving contingent remainders, &c. The testator died without having any other child, and *William* died in his lifetime without issue. *Thomas* died after testator's death without issue, after having taken the name and arms of S. and entered into possession of that estate. *Charles* took the name and arms of D., and entered into possession of the W. estate, and on the death of *Thomas* relinquished said name and arms, and took those of S. only, and entered into possession of S. estate. *Ann* married in testator's lifetime, and has issue a son. *Elizabeth* married, and has issue a son and other children. *Charles*, *Mary*, and *Catherine* are living and unmarried.

Held that the words "younger son or daughter" in the said

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shifting clauses should be construed distributively, viz. a son younger than a son, or a daughter younger than a daughter; that the estates W. and E. were intended to shift from sons to sons, and from daughters to daughters, not from sons to daughters, according to seniority; and that *Charles*, the third son and youngest child, was, in the events that happened, entitled to the three estates for his life.

THOMAS ECCLESTON, formerly of *Scarisbrick*, in the county of *Lancaster*, esq. deceased, having at the time of making his will, hereinafter stated, three sons and four daughters, namely, *Thomas*, *Ann*, *Mary* (the first-named Respondent), *Elizabeth* (the Respondent Mrs. *Clifton*), *Catherine*, *William*, and the Appellant, then called *Charles Eccleston*, all born in the order in which they are here named, duly made his will dated the 14th of *October* 1806; and thereby, after reciting that he was seised of or entitled to several manors, messuages, lands, tenements and hereditaments, in the said county, for an estate of inheritance in fee-simple in possession, subject to certain incumbrances affecting the same; and that under the will of his late uncle, *William Dicconson*, esq. he was entitled to the manor of *Wrightington*, and to several messuages, lands, &c. in *Wrightington*, and in *Parbold*, in the same county, for an estate of inheritance in fee-simple in remainder expectant on the decease of *Edward Dicconson*, esq. (brother of the said *William*), and failure of issue male of his body, he devised all the manors, messuages, lands, &c. of or to which he was so seised or entitled, unto and to the use of *Edward Wilbraham Bootle* (now Lord *Skelmersdale*), and the Rev. *Streysham Master* (the last-named Respondents), their heirs and assigns, upon trusts therein expressed concerning the same; (that is to say), As to his manor of *Scaris-*

Devise of all
testator's real
estates in
trust.

brick, and all his messuages, lands, &c. in *Scarisbrick*, which belonged to *Robert Scarisbrick*, esq. his grandfather, or which he (the testator) had purchased, and called his *Scarisbrick* estate; and also all his estate in *Burscough* in the said county, called the *Muscar* estate, purchased by him; And as to his manors of *Halsall* and *Down-Holland*, and his messuages, lands, &c. in *Halsall* and *Down-Holland*, which he had purchased of Colonel *Mordaunt*, and called his *Halsall* estate; And as to the said manor, messuages, lands, &c. late of the said *William Dicconson*, and to which he (the testator) was so entitled in remainder as aforesaid, and which he called his *Wrightington* and *Parbold* estates; Upon trust that they the said trustees and the survivor of them, and the heirs and assigns of such survivor, should by such assurances in the law, and in such manner as they or he should think fit, convey and assure the said manors and other hereditaments so and in such manner as that the same (as far as the rules of law and equity, and the circumstances of the case would admit, and as would be consistent with the general purport and meaning of his will) might go, remain, and be To the uses, and upon and for the trusts, intents and purposes therein expressed concerning the same; (that is to say),

As to his *Scarisbrick* and *Halsall* estates; To the use and intent that his wife and her assigns might, during her life, receive out of them an annual sum of 600 *l.*, the same to be in bar of dower; and subject thereto, that they, the said estates, should, by the said intended settlement, be settled to the use of the said *E. W. Bootle* and *S. Master*, their executors, administrators and assigns, for the term of 1000 years, upon the trusts therein expressed; and after the expiration of that term, To the use of testator's eldest son, *Thomas Eccleston*, and his assigns for his life; and after his

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the *Scarisbrick*
estate,(subject to a
rentcharge and
a term,)1st. To tes-
tator's sons
and their
issue.

1838.
 SCARISBRICK
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decease, To the use of his first and other sons successively in tail male; and for default of such issue, To the use of testator's second son, *William Eccleston*, and his assigns for his life; and after his decease, To the use of his first and other sons successively in tail male; and for default of such issue, To the use of testator's third son, *Charles Eccleston*, and every other subsequently born son of testator's body, successively in the order of his birth, during his life; and after his respective decease, To the use of his respective first and other sons successively in tail male; and for default of such issue, and after the respective decease of each of testator's said sons, To the use of testator's first and other sons successively in tail, but so that the respective son or sons of the eldest of testator's said sons, and such their respective issue as aforesaid, should take before the respective son or sons of the younger of testator's said sons and their respective issue; and for default of such issue, and after the respective decease of each of testator's said sons, To the use of his (each son's) first and other daughters successively in tail, but so that the respective daughter or daughters of the eldest of testator's said sons, and such their respective issue as aforesaid, should take before the respective daughter or daughters of the younger of testator's said sons, and their respective issue as aforesaid; And for default of such issue, to the use of other trustees, to be named by the above-named trustees, during the life of testator's eldest daughter, *Ann Eccleston*, in trust, to apply the rents of these estates to her separate use during her life, and after her decease, to the use of her first and other sons successively in tail male; and for default of such issue, to the use of her first and other sons successively in tail; and for default of such issue, to the use of her daughters, as tenants in common in tail, with cross

2dly. To testator's daughters and their issue.

remainders between them in tail; and if all her daughters, except one, should die without issue, or there should be but one such daughter, to the use of such one or only daughter in tail; And for default of such issue, with like remainders to each of the testator's other daughters successively in the order of their birth, and to their respective issue; with divers remainders over in strict settlement, for the benefit of strangers; with ultimate remainder to the use of testator's right heirs.

And the testator directed that in the said settlement should be contained a proviso that his son *Thomas*, and every person who, by virtue of the limitations to be contained therein or otherwise, should become entitled to the possession or to the rents of the *Scarisbrick* and *Halsall* estates, and every person who should marry a female so becoming entitled as aforesaid, should, within one year after so respectively becoming entitled or marrying, take and use the surname and arms of *Scarisbrick* only, in addition to his or her Christian name; and that in the said proviso it should be declared that, in case any such person should within the said space of one year neglect or discontinue to take and use such surname and arms, then the uses and trusts to be limited in the said settlement in said estates, to him or her so neglecting or discontinuing, or to her whose husband should so neglect or discontinue, should absolutely cease, and the same estates should in every such case immediately thereafter go to the person next beneficially entitled in remainder, in the same manner as if the person whose estate should so cease, being tenant for life, was dead, or being tenant in tail, was dead without issue inheritable under such entail.

And the testator directed that the settlement so to

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v.
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and others.

3dly. To
strangers.
4thly. To
testator's right
heirs.

Name and
arms of *Scaris-*
brick.

1838.

SCARISBRICK

v.

ECCLESTON

and others.

Declaration of
trusts of term.

be made as aforesaid, should contain a declaration of the trusts of the said term of 1000 years, viz. 1st. for better securing by the usual ways and means the said annual sum of 600 *l.* to the testator's widow: 2dly, for securing payment of such of his funeral expenses, debts, and legacies, as his personal estate and the other funds provided for that purpose would not satisfy: 3dly, for securing to every son of the testator thereafter to be born, and to each of testator's daughters then living, and thereafter to be born, during his or her life, the annual sum of 100 *l.* in addition to the portion thereafter provided for him or her respectively: 4thly, for securing, for the maintenance and education of each of the testator's sons, *William* and *Charles*, and of every son thereafter to be born to the testator, until the age of 21, such annual sum of money as the said trustees should think proper, not exceeding 200 *l.*, in addition to the said annuities; and for the maintenance and education of each of testator's daughters then living, and thereafter to be born, until the age of 21 or marriage, such sum of money as the trustees should think proper, not exceeding 100 *l.*, in addition to the said annuities: 5thly, for raising, during the space of twenty years from the day of the testator's decease, out of the yearly rents of the said estates, an annual sum of 1,000 *l.*, and to accumulate the same, and apply the same and the accumulation thereof towards the payment of testator's funeral expenses, debts and legacies: 6thly, as an auxiliary security for the payment of the sums of 5,000 *l.*, thereafter directed to be raised for testator's daughters, and his fourth and other subsequently born sons: 7thly, for securing an additional annuity to testator's wife in either of two events, which did not happen: and 8thly, for securing

additional provisions for subsequently born sons and for daughters of testator, in an event which did not happen.

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and others.

And as to the estate in *Burscough* aforesaid, and the said *Wrightington* and *Parbold* estates, the testator directed that the said *E. W. Bootle* and *S. Master*, and the survivor of them, &c. should convey and assure the same to the use of them, *E. W. Bootle* and *S. Master*, their executors, &c. for the term of 2000 years, upon the trusts therein expressed; And after the expiration of that term, To the use of testator's second son *William*, and his assigns for life; and after his decease, To the use of *William's* first and other sons successively in tail-male; and for default of such issue, To the use of testator's third son *Charles*, and every other subsequently born son of testator's body successively in order of his birth, during his life; and after his respective decease, To the use of his respective first and other sons successively in tail-male; and for default of such issue, To the use of testator's eldest son *Thomas*, and his assigns for life; and after his decease, To the use of *Thomas's* second and other sons successively in tail-male; and for default of such issue, To the use of *Thomas's* first or only son in tail; and after the decease of each of testator's said sons, taking in such order as last before mentioned, To the use of his first and other sons successively in tail, but so that the respective son or sons of the eldest of such sons, and such their respective issue as aforesaid, should always take before the respective son or sons of the younger of such sons and their respective issue as aforesaid; and for default of such issue, and after the respective decease of each of testator's said sons taking in such order as aforesaid,

Limitations of
Wrightington
estate,

(subject to a
term,)

1st. To testa-
tor's sons and
their issue.

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ECCLESTON
and others.

2dly. To tes-
tator's daugh-
ters and their
issue.

3dly. To
strangers.
4thly. To
testator's
right heirs.

To the use of his first and other daughters successively in tail, but so that the respective daughter or daughters of each of testator's sons, first taking in such order as aforesaid, and such their respective issue as aforesaid, should always take before the respective daughter or daughters of the son or sons, to take next in such order as aforesaid, and their respective issue as aforesaid ; And for default of such issue, To the use of trustees during the respective lives of testator's said *second*, third, and fourth daughters, and every other subsequently born daughter of his body ; in trust to apply the rents and profits of the last-mentioned estates to the separate use of the said daughters, and every other subsequently born daughter of his body, successively in order of her birth, during her life, but so that after the respective decease of each such daughter, taking in such order as aforesaid, the last-mentioned estates should remain to the use of her respective sons and daughters in such order and for such estates as before expressed in their regard with respect to the *Scarisbrick* and *Halsall* estates ; And for default of such issue, To the use of the last-mentioned trustees and their heirs, during the life of testator's eldest daughter *Ann*, in trust to apply the rents and profits of the last-mentioned estates to the separate use of the said *Ann* during her life ; And after her decease, To the use of her sons and daughters in such order and for such estates as before expressed in their regard with respect to the *Scarisbrick* and *Halsall* estates ; And for default of such issue, &c. ; with several other remainders over, in strict settlement, for the benefit of strangers ; with the ultimate remainder to the use of testator's right heirs.

“ And in the said settlement shall be contained a proviso, that if by virtue of the limitations contained therein, the said *William Eccleston* and *Charles Eccleston*, or any of my subsequently born sons, or my said daughters, *Mary Eccleston*, *Elizabeth Eccleston*, and *Catherine Eccleston*, or any of my subsequently born daughters, or any issue of the respective bodies of my said sons or daughters shall become actually entitled to the possession or to the receipt of the rents, issues and profits of my said *Scarisbrick* and *Halsall* estates, and any younger son or daughter of my body, or any issue of such younger son or daughter, shall be then living ; then and in that case, and so often as the same shall happen, as well the uses to be limited in the said settlement in my said estate purchased (viz. *Burscough*), and my said *Wrightington* and *Parbold* estates, as the annual sum of 500 *l.*, hereinafter directed to be made payable to the child who or whose issue shall so become entitled as aforesaid, and to his or her issue, shall absolutely cease ; but in the said proviso for shifting, it shall be declared that if by virtue thereof my said estate purchased (*Burscough*), and my said *Wrightington* and *Parbold* estates, shall have shifted to the said *Charles Eccleston*, or any of my subsequently born sons, or to the said *Elizabeth Eccleston* or *Catherine Eccleston*, or any of my subsequently born daughters, or any issue of the respective bodies of my said sons or daughters, and there shall afterwards be a failure of issue of all my sons or daughters, who shall be younger than the son or daughter from whom or from whose issue the same shall have so shifted as aforesaid ; then, and in that case my said estate purchased (*Burscough*), and my said *Wrightington* and *Parbold*, estates, shall return, be and remain to the uses, and be held in the manner

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SCARISBRICK
v.
ECCLESTON
and others.

Wrightington
shifting clause.

Reverter.

1838.

SCARISBRICK

v.

ECCLESTON
and others.Name and
arms of *Dic-*
conson.

in which the same would have gone and been held if the proviso for shifting the same were not inserted."

And the testator directed that in the said settlement should be contained a proviso, that his son *William*, and every person who by virtue of the limitations to be therein contained, or of that proviso or of the proviso last-mentioned, should become entitled to the possession or to the rents of his said *Burscough*, *Wrightington*, and *Parbold* estates, and every person who should marry a female so becoming entitled (save and except testator's eldest son *Thomas* and his issue), should, within one year after becoming so respectively entitled or marrying, take and use the surname and arms of *Dicconson* only, in addition to his or her christian name; and that in the said proviso it should be declared, that in case any such person should neglect or discontinue to take or use such surname and arms, then, after the expiration of the said year, as well the uses and trusts to be limited in the said settlement in the *Burscough*, *Wrightington*, and *Parbold* estates, as the annual sum of 500 *l.*, thereafter directed to be made payable to him or her so neglecting or discontinuing, or to her whose husband should so neglect or discontinue, should absolutely cease.

Declaration of
trusts of the
term of 2,000
years.

And he directed that the settlement so to be made as aforesaid should contain a declaration of the trusts of the term of 2,000 years, viz. for securing payment of such of testator's funeral expenses, debts, and legacies, as his personal estate and the other funds by his will provided for that purpose would not be sufficient to satisfy; and as an auxiliary security for payment of the sums of 5,000 *l.*, directed to be raised for his daughters, and fourth and other subsequently born sons, out of the estates thereafter directed to be sold, and if no part of the *Eccleston* and *Sutton*

estates thereafter devised (as hereinafter stated), should remain after answering the trusts and purposes declared concerning the same, or if the part which should remain should be under the value of 10,000 *l.*, then for raising the sum of 10,000 *l.*, or such sum as should make the value of the remaining estate equal to that sum, and paying the same to testator's son *Charles*, his executors, administrators, and assigns; but in case *Charles* should die under 21, without issue, then to such subsequently born son of testator as should first attain 21, or die under that age leaving issue, his executors, &c. ; and for paying to any child of testator, or the issue of such child who, under the limitations of the said settlement, should be entitled to the possession or to the rents of the *Wrightington* and *Parbold* estates, and who, having attained his or her age of 21, should be under 25, an annual sum of 500 *l.* until he or she should attain his or her age of 25, and for receiving the surplus of the rent of the hereditaments comprised in the said term, after answering the trusts and purposes aforesaid, as well during the minority of any person so entitled as aforesaid, as during such time as any child of testator so entitled as aforesaid, should be under the age of 25, and to accumulate the same in manner before mentioned, and at the end of every such period of accumulation to apply the fund so accumulated in payment of testator's funeral expenses, debts, and legacies.

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 SCARISBRICK
 v.
 ECCLESTON
 and others.

And as to all testator's said manor of *Eccleston*, and all his messuages and hereditaments in *Eccleston* and *Sutton Widness*, which he called his *Eccleston* estate, and also as to all other the hereditaments before devised by him, the trusts of which were not before declared,

Limitations of
 the *Eccleston*
 estate.

1838.

SCARISBRICK

v.

ECCLESTON
and others.

After securing
debts, legacies
and provisions
for after born
children.

If residue
should not ex-
ceed 15,000 *l.*
for *Charles*
absolutely.

In case testa-
tor left only
two sons, for
the eldest.

he directed that the said *E. IV. Bootle* and *S. Master*, and the survivor of them, &c. should by sale or mortgage of the same or of a competent part thereof, and out of rents thereof, in the meantime, raise such sum of money as they should think expedient for the payment of testator's funeral expenses, debts, and legacies, and in the next place should raise the sum of 5,000 *l.* a piece for the fourth and every subsequently born son of testator, and the like sum of 5,000 *l.* for each of testator's daughters, to be interests vested in respect to a son or sons at the age of 21, and in respect to a daughter or daughters at 21 or marriage, but without benefit of survivorship, and not to be attended with interest till the same respectively should be vested; and the testator declared that in case the whole of his said *Eccleston* estate should not be sold or mortgaged for the purposes aforesaid, and the residue thereof, after said trusts and purposes should have been answered, should not exceed the value of 15,000 *l.*, or in case the whole should have been sold or mortgaged for the purposes aforesaid, then if the residue of the monies to arise from such sale and the equity of redemption of the estates so mortgaged should not exceed the sum of 15,000 *l.*, the said trustees should stand seised and possessed of the residue of such estate or of such monies respectively, as the case might be, in trust for testator's son *Charles*, or such subsequently born son of testator as should first attain 21, or die under that age leaving issue, his heirs, executors, &c. respectively for ever; and that in case testator should leave only two sons, in trust for the eldest of such sons, his heirs, executors, &c. respectively; But in case such residue of the *Eccleston* estate or of such monies respectively should exceed 15,000 *l.*, then testator directed that

such parts of such residue as should consist of money should be laid out by the said trustees in the purchase of freehold or copyhold lands, and that as well the lands to be so purchased as such part of the *Eccleston* estate as should not have been sold, and the equity of redemption of such part thereof as should have been mortgaged, should thenceforth go and remain, To the use of testator's third son *Charles*, and every other subsequently born son of testator successively, in the order of his birth, during his life, and after his respective decease, To the use of his respective first and other sons successively, in tail male; and for default of such issue, To the use of testator's eldest son *Thomas* for life, and after his decease, To the use of *Thomas's* first and other sons successively, in tail male; and for default of such issue, To the use of testator's second son *William* for life; and after his decease, To the use of *William's* first and other sons successively, in tail male; and for default of such issue, and after the decease of each of testator's said sons, taking in such order as last before mentioned, To the use of his first and other sons successively in tail, but so that the respective son or sons of the eldest of such sons and such their respective issue as aforesaid should always take before the respective son or sons of the younger of such sons and their respective issue as aforesaid; and for default of such issue, and after the respective decease of testator's said sons, taking in such order as aforesaid, To the use of his first and other daughters successively in tail, but so that the respective daughter or daughters of each of testator's said sons, first taking in such order as aforesaid, and such their respective issue as aforesaid, should always take before the respective daughter or daughters of the son or sons to take next in such

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v.
ECCLESTON
and others.

If residue
exceeded
15,000 *l.* same
to be settled.

1st. To use of
testator's sons
and their issue.

1838.

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and others.

2dly. To use of
his daughters
and their
issue.

order as aforesaid, and their respective issue as aforesaid ; and for default of such issue, To the use of trustees during the respective lives of testator's third and fourth daughters *Elizabeth* and *Catherine*, and every other subsequently born daughter of testator, in trust, to apply the rents and profits of the said hereditaments to the separate use of the said *Elizabeth* and *Catherine*, and every other subsequently born daughter of testator successively, in the order of her birth, during her life, but so that after the respective decease of each such daughter taking in such order as aforesaid, the last-mentioned estates should be and remain to the use of her respective sons and daughters, in such order and for such estates as were before expressed in their regard with respect to testator's *Scarisbrick* and *Halsall* estates ; and for default of such issue, to the use of the last-mentioned trustees, during the respective lives of testator's first and second daughters, *Ann* and *Mary*, in trust, to apply the rents and profits of the said hereditaments to the separate use of *Ann* and *Mary*, during her life, and after her respective decease, but so that after the respective decease of each such daughter, taking in such order as aforesaid, the last-mentioned estates should remain, to the use of her respective sons and daughters, in such order and for such estates as were before expressed in their regard with respect to the *Scarisbrick* and *Halsall* estates, and for default of such issue, to the uses before expressed of those estates, in default of testator's own issue, with the ultimate remainder to the use of testator's right heirs.

3dly. To
strangers.
4thly. To tes-
tator's right
heirs.

Eccleston
shifting clause.

“ And in the said settlement shall be contained a proviso, that if by virtue of the said settlement, the said *Charles Eccleston*, or any of my subsequently

born sons, or my said daughters, *Elizabeth Eccleston* and *Catherine Eccleston*, or any of my subsequently born daughters, or any issue male of the respective bodies of my said sons or daughters shall become actually entitled to the possession or to the receipt of the rents, issues, and profits of my said *Wrightington*, *Parbold*, and newly purchased *Burscough* estates, and any younger son or daughter of my body, or any issue of such younger son or daughter shall be then living, then and so often as the same shall happen, the uses to be limited in the said settlement, in the said hereditaments at *Eccleston* and *Sutton*, to the son or daughter, who or whose issue shall so become entitled as aforesaid, and to his or her issue, shall absolutely cease ; but, in the said proviso for shifting it shall be declared, that if by virtue thereof, the said hereditaments at *Eccleston* and *Sutton* shall have shifted to any of my other sons or daughters, or any issue of their respective bodies, and there shall afterwards be a failure of issue of all my sons or daughters, who shall be younger than the son or daughter from whom or from whose issue the same shall have so shifted as aforesaid, then and in that case the said hereditaments at *Eccleston* and *Sutton* should return, be, and remain To the uses and be held in the manner in which the same would have gone and been held if this proviso for shifting the same were not to be inserted."

1838.
 SCARISBRICK
 v.
 ECCLESTON
 and others.

Reverter.

And the testator directed that the said settlement should contain a proviso, that if any person for the time being entitled by virtue thereof, to the actual possession, or to the rents of any of the estates thereby directed to be settled, should be under 21, the said *E. W. Bootle* and *S. Master*, and the sur-

Provision for application of rents of estates during minorities of parties entitled.

1838.

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v.
ECCLESTON
and others.

vivor of them, and his executors, &c. should, so long as the person so entitled should be under that age (but subject and without prejudice as before mentioned), apply a competent part of the rents to which he or she should be so entitled, for such person's maintenance, unless such person were one of testator's said sons or daughters, and invest the residue in the names or name of the said *E. W. Bootle* and *S. Master*, or the survivor of them, or his executors, &c. in Government or real securities, so that the same during such minority might accumulate, and at the end of each such period of accumulation, or sooner, if they should think proper, should convert the said accumulated fund into money, and invest the same in the purchase of freehold, leasehold, and copyhold estates, and settle them to the uses and in the manner in which the testator had directed the estates, from the rents of which such accumulations should have proceeded, to be settled.

Cesser of an-
nuities.

And the testator directed, that in the said settlement, it should be provided that if any of his said daughters or of his said fourth and other sons, should by virtue of the limitations therein contained, become entitled to the actual possession or receipt of the rents of any of his said estates, and should then have attained, or should afterwards attain his or her age of 21, the said annual sum of 100 *l.* before provided for such son or daughter should absolutely cease: and that it also should be provided, that if any such child should so become entitled, before such child, being a son, should attain 21, or, being a daughter, should attain that age, or marry, in every such case the said original and additional portions before provided for each such child, or so much thereof as

And of provi-
sions for after-
born children
on becoming
entitled to any
of the settled
estates.

should not have been raised, should sink into and be consolidated with the freehold and inheritance of the estates to be respectively charged with the same.

And the testator directed that the said settlement should contain a power for the said *Thomas* during his life, and after his decease for every person thereby made tenant for life of the *Scarisbrick* and *Halsall* estates, when he should become entitled to the actual possession, or to the rents thereof, by deed or will, to charge these estates with an annual sum not exceeding 1,000 *l.*, to any woman whom he might marry, for her life, &c.; and a like power for every such tenant for life, both male and female, to raise portions not exceeding 10,000 *l.*, for his or her daughters and younger sons; and that the said settlement should contain similar powers for the said *William*, during his life, and after his decease, for any person thereby made tenant for life of the *Wrightington*, *Parbold*, and *Burscough* estates, when entitled to the actual possession, or to the rents thereof, except testator's said eldest son, to charge these last-mentioned estates with any annual sum not exceeding 500 *l.*, to any woman whom he might marry, for her life; and for every such tenant for life, both male and female, except testator's eldest son, to charge those estates with any sum of money not exceeding 5000 *l.*, for portions for his or her daughters or younger sons; and that the said settlement should contain similar powers for the said *Charles* during his life, and after his decease, for every person thereby made tenant for life of the said hereditaments at *Eccleston* and *Sutton*, when entitled to the actual possession, or to the rents of the said hereditaments, except the said *Thomas* and *William*, to charge the last-mentioned hereditaments with any annual sum not exceeding one quarter of the then actual yearly

1838.

SCARISBRICK

v.

ECCLESTON
and others.

Powers for tenants for life of *Scarisbrick* estate to jointure and portion.

Similar powers for tenants for life of *Wrightington* estate, except testator's son *Thomas*.

Similar powers for tenants for life of *Eccleston* estate, except testator's sons *Thomas* and *William*.

1838.

SCARISBRICK
v.
ECCLESTON
and others.

rent or value of the same, to any woman whom he might marry, for her life; and for every such tenant for life, both male and female, except the said *Thomas* and *William*, to charge these last-mentioned hereditaments with any sum of money not exceeding one-sixth of the clear annual value of the same hereditaments for portions for his or her daughters or younger sons.

Other usual
clauses.

The testator, after directing that the said settlement should contain provisions restrictive of the aggregate amounts of such charges on each estate, and powers of leasing, and sale, and exchange, proceeded thus:—
“And my will also is, that in the said settlement there shall be inserted such limitations for preserving contingent remainders, such provisos for the cesser of the terms to be thereby created, such other powers of leasing, such other powers for granting liberty to work mines and collieries, such provisions for the appointment of new trustees, and for the indemnity of the trustees, and all such other clauses, powers, provisos, agreements, and declarations not inconsistent with the general scope and true intent and meaning of this my will as the said *E. W. Bootle* and *S. Master*, or the survivor of them, or the executors or administrators of such survivor, or their or his counsel in the law shall think it advisable to insert for the advantage of the persons beneficially interested under the said settlement, or for explaining the same, or effecting the general object and purpose thereof.”

Devise of
leaseholds.

The testator then devised all his leasehold messuages, &c. in *Scarisbrick*, to be settled upon trusts corresponding with the limitations of the *Scarisbrick* estates; and after bequeathing several specific and pecuniary legacies, gave and bequeathed unto the

said *E. W. Bootle* and *S. Master*, their executors, &c. all arrears of rent and personal estate whatsoever, of or to which he should be possessed or entitled at his decease, and not before specifically disposed of, or which he should not thereafter by any codicil or testamentary writing dispose of specifically, in trust to convert the same into money, and pay his funeral expenses, debts, and legacies; and to pay the surplus, if any, to his said son *Thomas*, his executors, &c. for his and their own absolute use and benefit. And after directing the priority of application of the several funds provided for payment of funeral expenses, debts, and legacies, the testator appointed the said *Edward W. Bootle* and *Streynsham Master* executors of his will, and them, and his wife during her widowhood, guardians of his children.

The testator afterwards made five several codicils to his said will, all of which, except the last, were executed so as to pass freehold estates. By the first of them, dated the 20th of July 1807, the testator, after reciting that it was his intention that all his estate in *Burscough*, called the *Muscar* estate, and other lands in *Burscough*; and also all his lands in *Ormskirk*, *North Meols* and *Aughton*, in the said county of *Lancaster*, which belonged to his grandfather, or testator had since purchased, and which he considered as part of his *Scarisbrick* estates, should be included in the devise in his said will of his said *Scarisbrick* and *Halsall* estates; but that it might be doubtful whether they were so included and would pass by his said will, to obviate doubts respecting the same, devised the said *Muscar* estate and his other lands in *Burscough*, if any, except the estate there which he purchased; and also all his lands in *Ormskirk*, &c. which he considered as part of his said *Scarisbrick*

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SCARISBRICK

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and others.Bequest of
legacies.

1838.

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estates, unto and to the use of the said *E. W. Bootle* and *S. Master*, their heirs, &c. upon trust, that they should convey and assure the same, in such manner as that the same, as far as the rules of law and equity and the circumstances of the case would admit, and as would be consistent with the general purport and meaning of his will, might go, remain, and be, to such uses, upon trusts, and with and subject to such powers, provisoes and declarations, and charged and chargeable in every respect in the same manner as by his will, his said *Scarisbrick* and *Halsall* estates were by him given, limited, devised, and made subject to. And after reciting that since the date of his will he had purchased an estate in *Parbold* aforesaid, he devised the same unto, and to the use of the said trustees, upon trust, that they should convey and assure the same in such manner that the same, as far as the rules of law and equity and the circumstances of the case would admit, and as would be consistent with the general meaning and purport of his will, might go and remain to such uses, upon such trusts, and with and subject to such powers, provisoes and declarations, and charged and chargeable in every respect in the same manner as by his will his *Wrightington* and *Parbold* estates were by him given, limited, devised, and made subject to.

By the second codicil, dated 27 October 1809, the testator bequeathed additional annuities to his wife and daughters, charged like the provisions for them by his will; and he gave his wife a legacy of 200 £, and confirmed his will in all respects, as far as the same was not altered by the recent death of his son *William*. By the third codicil, dated the 1st of November 1809, the testator gave an annuity of 25 £. to be charged on his *Scarisbrick* estate; and by the fourth,

dated the same day, he gave certain small annuities to be charged on the same estate; and by the last codicil, dated the same day, he gave a legacy.

The testator died in November 1809 without having any child other than those hereinbefore named, and without altering or revoking his said will and codicils, which were soon afterwards duly proved in the proper ecclesiastical court by the said *E. W. Bootle* and *S. Master*, who thereby became the legal personal representatives of the testator. *William*, the second son, died without issue in the lifetime of the testator, but the two other sons and four daughters survived him, and at the time of his decease his son *Thomas* was his heir at law. He shortly after the testator's decease obtained the King's licence for using the surname and arms of *Scarisbrick*, and entered into the possession and receipt of the rents of the *Scarisbrick* estate. A similar licence to take and use the surname and arms of *Dicconson* was about the same time obtained for *Charles*, the Appellant, then an infant of the age of nine years, who thereupon took that name.

The residue of the *Eccleston* estates, after answering the purposes in that behalf mentioned in the will, considerably exceeded in value the sum of 15,000 *l.* and therefore became subject to the provisions for settling the same in strict settlement, in such manner as in the will mentioned.

By an order of the Court of Chancery for the county palatine of *Lancaster*, dated the 9th of *January* 1823, and made in two causes (for carrying the trusts of the will into execution), in one of which the said *E. W. Bootle* and *S. Master* were complainants, and the said *Thomas Scarisbrick*, the testator's widow, his daughter *Mary*, the Appellant *Charles Scarisbrick*, then *Charles Dicconson*, the said *Elizabeth Clifton*,

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then *Elizabeth Eccleston*, the said *Catherine Eccleston*, and Sir *Thomas Windsor Hunloke*, and Dame *Ann* his wife, formerly *Ann Eccleston*, and *H. J. J. Hunloke*, their infant son, were defendants; and in the other of which suits the same persons were complainants, and the Appellant and the said Dame *Ann Hunloke*, Sir *Henry John Hunloke*, the said *Catherine*, and the widow of testator were defendants, it was declared that the estates given by the will to the Appellant and his issue in the residue of the *Eccleston* estates never took effect, the testator's second son, *William*, having died in the lifetime of the testator, and that the said *Thomas Scarisbrick*, upon the death of the testator, became entitled for his life, without impeachment of waste, to the residue of the said *Eccleston* estate by the said will directed to be settled, and also to the leasehold estates, if any, directed to be settled with the residue of such estates. Pursuant to such decree the said *Thomas Scarisbrick* entered into possession and enjoyment of the rents of the *Eccleston* estate, as well as of the *Scarisbrick* estate, and continued in such possession and receipt or enjoyment until his death.

The testator's uncle, *Edward Dicconson*, in the said will named, died without issue in the testator's lifetime, and after the testator's decease, the Appellant, upon attaining his age of 25 years, entered into possession and enjoyment of the rents of the *Wrightington* estate, and continued in such possession or receipt until the death of *Thomas Scarisbrick*, who died in July 1833 without issue, but leaving a widow, in whose favour he had charged the *Scarisbrick* estates with a jointure of 1,000*l.* per annum, and leaving the Appellant his heir, and also the heir at law of the testator. Thereupon the Ap-

pellant, pursuant to the limitations contained in the will of the testator, entered into possession and receipt of the rents and profits of the *Scarisbrick* estates, and obtained the Royal licence to take and use the surname and arms of *Scarisbrick* only, and he accordingly took and used the same, and relinquished the name and arms of *Dicconson*.

No settlement has ever been made pursuant to the directions of the will. The widow of the testator died some time since; *Mary Eccleston*, his second daughter, is unmarried; *Elizabeth*, the third daughter, has been some time married to the said *Edward Clifton*, and the said *Thomas Clifton* is the eldest son of that marriage. The Appellant is unmarried.

In 1833 *Mary Eccleston*, *Edward Clifton*, and *Elizabeth* his wife, and *Thomas Clifton* their infant son, filed their bill in the Court of Chancery against the said *Edward Lord Skelmersdale, Streynsham Master*, and the Appellant, and after thereby stating the said will and codicils, and also the several facts and circumstances hereinbefore set forth, and that the said Lord *Skelmersdale* and *S. Master* declined to carry into effect the trusts of the said will, with respect to the *Wrightington* and *Eccleston* estates, except under the direction of the court, the plaintiffs submitted and insisted that by virtue of the provisions of the said will, in the events which happened, the *Wrightington* estate had gone over to and was then vested in *Mary Eccleston*, as tenant for life in possession thereof, and that the *Eccleston* estate had become vested in *Elizabeth Eccleston* as tenant for life in possession, and the said plaintiffs prayed that the rights and interests of all parties under the said will and codicils in both the said estates might be de-

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clared and ascertained, and that the defendants, the trustees, might be directed to pay and apply the rents and profits thereof respectively conformably thereto, and that proper directions might be given for making a settlement of the said estates agreeably to such rights and interests.

The Appellant, and also Lord *Skelmersdale* and *S. Master* put in their answers to the bill, and the Appellant by his answer admitted the matters hereinbefore set forth as the same are hereinbefore and were in the said bill stated, and he submitted and insisted that by virtue of the said will and first codicil he was entitled as tenant for life in possession to the *Wrightington* and *Eccleston* estates, as well as the *Scarisbrick* estate; and Lord *Skelmersdale* and *S. Master* by their answer declined to carry into effect the trusts of the said will, except under the direction of the court.

The cause came to be heard upon bill and answer before Sir *John Leach*, the Master of the Rolls, in March 1834, when his Honor declared that in the events which had happened upon the death of the said *Thomas Scarisbrick*, the Appellant having succeeded to the *Scarisbrick* estate, *Mary Eccleston*, as the next in order of succession after the limitation to the Appellant and his issue, became entitled to the *Wrightington* estate, and *Elizabeth Clifton* as the next in order of succession to *Eccleston* estate became entitled to that estate, and his Honor ordered that it should be referred to the Master to approve of a proper settlement to be made of both these estates, to the uses and upon and for the trusts, intents, and purposes in the will mentioned, regard being had to the declaration thereinbefore made, and all proper parties were to join in the execution of such settle-

ment as the Master should direct; and it was ordered that Lord *Skelmersdale* and *S. Master*, the executors and trustees, should account for the rents and profits of the *Wrightington* estate from the death of *Thomas Scarisbrick* to *Mary Eccleston*, and for the rents and profits of the *Eccleston* estate to *Edward Clifton*, in right of *Elizabeth* his wife; and it was ordered that it should be referred to the Master to tax all proper parties their costs of the suit, and that the Master should apportion the amount of such costs between the *Wrightington* and *Eccleston* estates according to their respective values (a).

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(a) The reporters have been favoured by the solicitors for the Respondents, with the short-hand writer's notes of his Honor's judgment, often referred to in the argument on the appeal, and admitted to be correct :—

The *Master of the Rolls* :—In this case the plaintiff, Miss *Eccleston*, claims to be entitled to the present possession of the *Wrightington* estate, under the limitations in the will of her father. She makes this claim in consequence of her brother, the defendant, Mr. *Scarisbrick*, having by the death of his elder brother, *Thomas*, succeeded to the possession of the *Scarisbrick* estate. The will contains a proviso that, if any son or daughter, or any issue of any son or daughter, who shall be entitled to the possession of the *Wrightington* estate, under the limitations of the testator's will, shall become entitled by the death of the person in the prior order of limitation to the *Scarisbrick* estate, then if there be any younger son or daughter living, or any issue of any such son or daughter, the limitation to the person who shall so succeed to the *Wrightington* estate, and his issue, shall totally cease.

Mar. 22, 1834.

The defendant, Mr. *Scarisbrick*, has now by the death of his brother succeeded to this *Scarisbrick* estate. There is now no younger son living,—the proviso being that if there be a younger son or daughter, or any issue of such son or daughter then living, the limitation of the *Wrightington* estate shall, upon the person so succeeding to the *Scarisbrick* estate, totally cease—there is now no younger son living, but there are daughters living, and the plaintiff, Miss *Eccleston*, is the daughter next in limitation, with respect to the *Wrightington* estate, to Mr. *Scarisbrick*, who succeeded to the *Scarisbrick* estate; and if the language used by the testator is to be understood in its plain and ordinary sense, it cannot be disputed that Miss *Eccleston's* claim to the *Wrightington* estate is now irresistible. It is, however, argued for the defendant, Mr. *Scarisbrick*, that, having regard to the whole scope of the testator's will, and the intention which he has manifested through-

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The Appellant appealed to the *Lord Chancellor* from so much of the said decree as declared, that in the

out the will to give a preference to his male descendants, it is to be inferred that it was not his intention that any daughter, or the issue of any daughter, should succeed to the *Wrightington* estate, so long as there existed any son or male descendant, and that Mr. *Scarisbrick* being a son, the daughter is not now entitled.

The general rule to be collected from all the authorities upon the subject with respect to the construction of such wills, is, that words which are in themselves clear and unambiguous must prevail, according to the intention of the testator thereby expressed, unless their plain and ordinary sense be irreconcilable with other plain expressions used by the testator, and be contrary to his general apparent intent.

In this particular case, although it is argued that the plain sense of these words is contrary to the testator's plain general intent, it is not pretended that there are any other expressions in the will with which this particular clause is irreconcilable.

If the Court were to adopt a different principle, and, in a case where there are plain unambiguous expressions, were, upon inference as to the general intention of the testator, to act against those plain and unambiguous expressions upon the presumed general intention, that would be not to give a construction to the will, but to make a new will for the testator. In this case, however, it does not appear to me that there is that general intention of the testator which is insisted upon on the part of the defendant, Mr. *Scarisbrick*.

I am of opinion that if this particular case had been presented to the attention of the testator, he would not have modified the expressions he has used, but have declared, as he has declared his intention, that if a daughter be living when a son becomes entitled to this *Scarisbrick* estate, that daughter should succeed to the *Wrightington* estate to the prejudice of the son.

My opinion, therefore, clearly is, that the plaintiff has established the claim made by this bill, and the declaration of the Court must be accordingly.

With respect to the *Eccleston* estate shifting clause, if the words are the same, of course the decision will be the same. It appears to me that the decree of the Duchy Court of *Lancaster*, as to the *Eccleston* estate, is a proper decree. It is a decree against the express words, but it is plain through the whole will, it would be quite irreconcilable with the other part of the will, if the eldest son, *Thomas*, did not then take. The expression is, "the younger son;" but the expression "younger son," employed as it is with respect to the *Eccleston* estate, means the person next in order of limitation. When the case was opened, I doubted upon the expression "the younger son," as to the *Eccleston* estate; when I came to read the whole will, it means evidently "the younger son" in the order of limitation. This will has been drawn with laborious attention, but it obviously escaped the attention of the drawer, that

events which happened *Mary Eccleston* became entitled to the *Wrightington* estate, and *Elizabeth Clifton* to the *Eccleston* estate; and as ordered that the said executors and trustees should account for the rents and profits of the *Wrightington* estate to *Mary Eccleston*, and of the *Eccleston* estate to *Edward Clifton*, in right of his wife, from the death of the said *Thomas Scarisbrick*.

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That appeal came on to be heard before Lord *Lyndhurst*, Chancellor, in April 1835, when his Lordship, being then about to resign the Great Seal, was pleased, without giving his reasons, to affirm the decree without costs.

From the said decree and the order affirming the same, the Appellant appealed to this House.

Mr. *Tinney* and Mr. *Duckworth*, (Mr. *Duval* with them,) for the Appellant:—The testator directs that his three estates shall be conveyed to uses, in strict settlement, for the benefit of his children, and their respective issue, in this manner—The *Scarisbrick* estate (the greatest in value) to be limited to *Thomas*, the eldest son, for life, with remainder to his first and other sons in tail male; the *Wrightington* estate (the next in value) to *William*, the second son, for life, with remainder to his first and other sons in tail male; and the *Eccleston* estate (the least in value) to the Appellant, the

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what the testator has purposed has not been accomplished in this respect. He plainly meant to prefer his eldest daughter to the second daughter, but he has so contrived the limitation that the eldest daughter loses the *Wrightington* estate, and the second daughter obtains it. There ought to have been the same shifting clauses as to the daughters that there are as to the sons.

The costs of all the parties are to come out of the estate, although it does not appear to me that the language of this will warrants any serious doubts upon the subject.

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youngest son, for life, with remainder to his first and other sons in tail male; with remainders over, as to each estate, (after failure of the limitations to the son, who is to take in possession, and his issue male,) in favour of the other sons of the testator, born or to be born, and their respective issue male and female, and of the female issue of the son who is to take in possession. Under these limitations the three estates may centre in any one son of the testator or his issue male or female; and there must be a failure of issue male and female of all the sons, born or to be born, before any of the estates can go over under the subsequent limitations. On failure of all the limitations for the benefit of the sons and their respective issue, the three estates are disposed of in favour of the testator's daughters and their respective issue, nearly upon the same principle, as that before adopted with respect to the sons. *Ann*, the eldest, takes the *Scarisbrick* estate, with remainders to her male and female issue. The Respondent *Mary*, the second daughter, takes the *Wrightington* estate, with remainders to her male and female issue. And the Respondent, *Elizabeth*, the third daughter, takes the *Eccleston* estate, with remainders to her male and female issue, with remainders over, as to each estate, after failure of the limitations to the daughter, who is to take in possession and her issue, in favour of the testator's other daughters, born or to be born, and their respective issue. Under these limitations the three estates may centre in any one daughter or her issue male or female. After failure of all the testator's children and their issue the three estates are limited over to strangers in strict settlement.

The principal question is, whether the shifting clause, directed to be inserted in the settlement of the

Wrightington estate, was or was not intended to interfere with the system of the original limitations, so far as by the effect of those limitations all the estates were to unite in any one son of the testator, or his issue male or female, before the re-distribution of the several estates among the daughters or their issue. A departure from the principle of the original limitations would follow from holding that, in any case, the estate was to shift from a son of the testator or his issue to a daughter of the testator or her issue. The Appellant submits, that the shifting clause in respect to the *Wrightington* estate was not intended to have that effect; but that that estate was to shift only in two several events, viz. *First*, If the *Scarisbrick* estate should come to *William*, the second son, or any younger son of the testator, or any issue of *William* or of any younger son of the testator, and there should then be living any son of the testator younger than the son who or whose issue should so become entitled, or issue of any such younger son; *Secondly*, if the *Scarisbrick* estate should come to *Mary*, the second daughter, or any younger daughter of the testator, or any issue of *Mary* or of any younger daughter of the testator, and there should then be living any daughter of the testator younger than the daughter who or whose issue should so become entitled, or issue of any such younger daughter. The propositions, therefore, which the Appellant has to establish for the purpose of obtaining a reversal of the decree are these, *First*, That the *Wrightington* estate was not to shift from any son of the testator, upon his becoming entitled to the *Scarisbrick* estate, unless some other son of the testator, or issue of some such other son, should be then living; and when the Appellant became entitled to the *Scarisbrick* estate, the other

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sons of the testator were dead without issue. *Secondly*, That the *Wrightington* estate was not to shift, in any case, unless some child of the testator younger in age than the son or daughter, who or whose issue, should become entitled to the *Scarisbrick* estate, or issue of some such younger child should be then living; and when the Appellant became entitled to the *Scarisbrick* estate, there was not in existence any child of the testator younger in age than the Appellant, nor issue of any such younger child.

In order to arrive at the proposed result, it is only necessary that, in the construction of the sentence “If by virtue of the limitations contained therein, the said *William* and *Charles*, or any of my subsequently born sons, or my daughters *Mary*, *Elizabeth* and *Catherine*, or any of my subsequently born daughters, or any issue of the respective bodies of my said sons or daughters, shall become actually entitled to the possession or to the receipt of the rents of my said *Scarisbrick* estate, and any younger son or daughter of my body, or any issue of such younger son or daughter, shall be then living,” the word “younger,” should be considered the correlative of the “son or daughter,” who should become entitled to the *Scarisbrick* estate, which construction is the only proper one; and that the words “younger son or daughter,” should be read distributively, viz.—“A son younger than a son, or a daughter younger than a daughter,” which is their natural and even necessary sense. By thus reading the clause, according to the familiar mode of construction, *reddendo singula singulis*, the original system of the limitations is preserved as to the preference, in every case, of the sons of the testator, and their issue, to the daughters of the testator and their issue.

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But to this construction it may be objected here, as it was in the Court below, that the word "younger," is not the correlative of the "son or daughter," who should become entitled to the *Scarisbrick* estate, but is used to describe a son or daughter younger than *Thomas* the eldest son, or *Ann* the eldest daughter. The Appellant's answer to that objection is, that in order to give the word "younger" this construction, it will be necessary to insert the word "other," in order to exclude the son or daughter, who becomes entitled to the *Scarisbrick* estate; the words should have been "any other younger son or daughter." That this is not the proper construction, is made manifest by the inconsistencies as to the effect of the shifting clause, to which it would lead.

It may be again objected here, as it was in the Court below, that the words are to be read, "any younger son or any daughter." To that objection the Appellant answers, that these words, according to the rules of grammatical construction, must mean "any younger son or younger daughter," for the adjective "younger," equally with the adjective "any," to which it is joined, is as applicable to the word "daughter" as to the word "son," and, to give the words the construction which the Respondents contend for, it will not only be necessary to repeat the word "any," but also to add the word "other," in order to exclude the daughter who becomes entitled to the *Scarisbrick* estate; that is, that the words should have been "any younger son or any other daughter." The same inconsistencies as to the effect of the shifting clause would follow this construction, as that before noticed.

A third objection to the Appellant's construction of this shifting clause, is, that the words "younger son

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or daughter," do not mean distributively, "a son younger than a son, or daughter younger than a daughter," but, as one case, "a son or daughter younger than a son, or younger than a daughter." But it is clear that this is not the natural construction; such a meaning should have been expressed by the word "younger child." The Appellant is entitled, upon the distributive construction for which he contends, whether "younger" means "posterior in birth," or "posterior in limitation." But the Respondent, *Mary Eccleston*, can only be entitled by construing the word "younger" "posterior in limitation." Except in the case of portions, "younger" can only be read in its natural sense, unless a different sense is required by the context. The consequences which would follow from holding, either that the shifting clause is not to be read distributively, or that the word "younger" is to be read "posterior in limitation," sufficiently show that the converse in each case is the true construction in other parts of the case. (They cited, in support of the distributive construction, *Windham's case*, 5 Co. Rep. 8; *Cook v. Gerrard*, 1st Saund. 181; *Doe dem. Annandale v. Brazier*, 5 Barn. & Ald. 64, and 2 Jarm. Powell on Devises, 112, and *Stanley v. Stanley*, 16 Ves. 491.)

A reference to other clauses in the will serve to explain this shifting clause. The reverter clause is always framed with relation to the shifting clause; and if the shifting and the reverter clauses do not fit each other, there is a manifest blunder in framing the proviso. Their exact correspondence must be intended; and therefore, if in the shifting clause there be any ambiguity in the description of the persons on whose existence the shifting is to depend, there cannot be a surer test of its meaning than the description, in the reverter

clause, of the cases in which such reverter clause is to operate, and of the persons on failure of whom the estate is to revert. To apply this principle to the shifting clause in question, as it is construed by the Respondents, the *Wrightington* estate might shift to *Mary*, because, according to that construction, the estate was intended to shift from a son of the testator or his issue to a daughter of the testator or her issue. But the case of the *Wrightington* estate having shifted to *Mary* is not provided for in the reverter clause. The words are, “if my said *Wrightington* estate shall have shifted to the said *Charles*, or any of my subsequently born sons, or to the said *Elizabeth* and *Catherine*, or any of my subsequently born daughters, or any issue of the respective bodies of my said sons or daughters,” &c. which clearly exclude *Mary*, who was older than *Elizabeth* and *Catherine*. This omission of *Mary* in the reverter clause is conclusive to show that the *Wrightington* estate was not intended to shift to her, and it is an inevitable consequence, that the words “younger son or daughter,” as used in the shifting clause, must be read in their natural sense, “a son younger than a son, or a daughter younger than a daughter,” according to which construction, *Mary* can in no case take under the shifting clause, and is therefore properly omitted in the reverter clause.

It is admitted on all hands that the testator did not intend any one of the three estates to go over to strangers till all his issue were exhausted. But if the *Wrightington* estate were now to shift to *Mary*, and she and all the other daughters of the testator were to die without issue, that estate would not revert to *Charles* or his issue, but go over to strangers; and the same consequence might follow if the estate were to shift to a daughter of *Thomas*, or her issue, or to

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Ann or her issue ; and thus the manifest intention of the testator would be subverted.

The general intention attributed to the testator, according to the Appellant's construction, is the probable one, viz. that no other preference is shown to the sons in the original limitations, than the difference in value of the estates given to them according to priority in birth. If the Appellant's construction be not adopted, a further preference will be shown of *Thomas* to *William* and *Charles*, and then of *William* to *Charles*. It is clear that the three estates might have united in *Thomas* or his issue, and that *William* or any of his issue might have held the *Scarisbrick* and *Eccleston* estates together. It is highly improbable that the testator intended *Charles* and subsequently born sons or their issue to be in a worse situation than *Thomas* and *William* or their issue, and that two estates should go to two of his younger daughters, while his eldest daughter had no provision. Nothing but express and unequivocal language ought to lead to such an absurd and capricious disposition.

Indications of intention may be collected from other parts of the will. The trusts of the term of 1000 years in the *Scarisbrick* estate are to raise an additional annuity of 1,000 *l.* for the testator's wife, if all his sons, except one, should die without issue. That provision affords direct and unequivocal proof of the testator's intention, that the two estates might unite in any one son, or his issue, during the existence of a daughter of testator or her issue.

The Respondents contend that the name and arms clauses favour their construction. The *Scarisbrick* name and arms clause provides that every person becoming entitled to that estate, shall take and continue to use the name and arms of *Scarisbrick* only ; and the

Dicconson name and arms clause provides that every person becoming entitled to the *Wrightington* estate, except *Thomas* and his issue, shall take and continue to use the name and arms of *Dicconson*. But it is argued that *Thomas* and his issue were excepted in the latter clause, because in their case the estates might unite in one person, and it was intended that the name and arms of *Scarisbrick* should, after the union, be continued by *Thomas* and his issue; and that as the direction to use the name and arms of *Scarisbrick* and the direction to use the name and arms of *Dicconson* could not be complied with at the same time, some provision would have been made to meet this difficulty in the other cases if a union of the two estates had been intended. The Appellant's answer to that argument is, 1st. If there had been a failure of the limitations to *William* and *Charles* and the testator's subsequently born sons and their respective issue male, the *Wrightington* estate would have come to *Thomas* under the limitations; and then under the *Dicconson* name and arms clause (which in that case would operate subsequently to, and would therefore supersede the *Scarisbrick* name and arms clause,) *Thomas*, if there had been no exception, would have been bound to take the name and arms of *Dicconson*; and as this was not intended the exception was necessary. 2dly. In the other cases the person to whom the *Scarisbrick* estate devolves must have previously held the *Wrightington* estate; and the *Scarisbrick* name and arms clause would therefore supersede the *Dicconson* name and arms clause, to which it would be subsequent in operation; and thus the predominance of the *Scarisbrick* name and arms, which no doubt the testator intended, is always preserved. As in the case which happened, *William*

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dying without issue male, the *Wrightington* estate went to *Charles*; and in compliance with the *Dicconson* name and arms clause, he took the name and arms of *Dicconson*. Then *Thomas* died without issue male, and the *Scarisbrick* estate came to *Charles*, who thereupon became bound to take and use the name and arms of *Scarisbrick* only. This he could not do without abandoning the name and arms of *Dicconson*; and the provision under which he took the name and arms of *Dicconson* was therefore necessarily superseded by the *Scarisbrick* name and arms clause. And so upon the same principle that the *Dicconson* name and arms clause would have superseded the *Scarisbrick* name and arms clause upon the accession of *Thomas* to the *Wrightington* estate, (if he had not been excepted in the *Dicconson* name and arms clause,) the *Scarisbrick* name and arms clause superseded the *Dicconson* name and arms clause upon the accession of *Charles* to the *Scarisbrick* estate. It was therefore unnecessary to make provision in the *Dicconson* name and arms clause to meet the case of the union of the two estates in any of the younger sons.

In favour of the alleged intention, that the *Scarisbrick* and *Wrightington* estates were not to unite in the same person, except in the case of *Thomas* or his issue, great reliance has been placed by the Respondents on the exceptions the testator has introduced in the powers of jointuring and charging with portions for younger children; and it has been argued that from the exception of *Thomas*, in the powers of charging the *Wrightington* estate, and the absence of any provision in these powers for the case of a union of the estates in *William* or *Charles*, it is to be inferred that the testator contemplated the union of the *Scarisbrick* estate and the *Wrightington* estate in

Thomas, and not in *William* or *Charles*. But it is obvious that *Thomas* was excepted in the powers of charging the *Wrightington* estate, because at the time of his accession to that estate, he must have been in the possession of the *Scarisbrick* estate, and he would therefore have the power of charging that estate, which the testator considered sufficient. He was excepted in the power of charging the *Eccleston* estate for the same reason. In like manner, *William* was excepted in the power of charging the latter estate, because, at the time of his accession to that estate, he must have been in possession either of the *Scarisbrick* or of the *Wrightington* estate, or of both, and would have the power of charging them.

(The arguments for the Appellant in respect to the *Eccleston* shifting clause were to the like effect, maintaining these two propositions, *First*, That that clause, like the *Wrightington* shifting clause, was to be read distributively, that is, so as to shift the estate as between sons and their issue, and as between daughters and their issue, but not as between sons and daughters; and consequently, if the *Eccleston* estate shifted to *Thomas*, the testator's eldest son, upon the Appellant becoming entitled to the *Wrightington* estate, the *Eccleston* estate reverted to the Appellant upon the death and failure of issue of *Thomas*, *William* the only other son of the testator having also died without issue: *Secondly*, That by the shifting clause applicable to the *Eccleston* estate, that estate was not to shift from any son of the testator on his becoming entitled to the *Wrightington* estate, unless some other child of the testator younger in age than the son so becoming entitled, or issue of some such younger child, should be then living, and when the Appellant became entitled to the *Wrightington* estate,

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there was not in existence any child of the testator younger in age than the Appellant, or issue of any such younger child.)

Mr. *Pemberton* and Sir *William Follett*, (Mr. *Walker* with them,) for the Respondents:—If the decree pronounced in the suit in the Court of Chancery in the county of Lancaster—in which all the parties acquiesced—was consistent with law, the decree which is the subject of this appeal cannot be disturbed. The proper way to give a true construction to the will, is to read all the clauses together, and from the whole to collect the testator's intention. And if there be inconsistent clauses which may bear different constructions, that is to be adopted which effectuates the testator's general intention. The only safe rule of construction is,—avoiding all vague conjectures,—to consider the language used, and give it the ordinary interpretation. Adopting that rule, your Lordships will find that the decree which has been pronounced is consistent with the express words of the will, as well as the plain and manifest purpose and intention of the testator, as declared by his will, and is the only one which could have been made without a departure from the established rules and principles of construction applicable to wills.

All parties agree that it was the primary object and general intention of the testator—except in certain cases specially provided for in his will, and which have not happened—to give one of his three estates to each of his three sons, and raise up and perpetuate three distinct families, each of whom was from time to time to enjoy one of the estates, and to each of whom he attached distinct names and family arms.

One way to test the construction of the will is,

• first, to read it without the shifting clauses, and try if it will bear any other construction than that given to it by the Duchy Court, by the Master of the Rolls, and Lord Chancellor *Lyndhurst*. To any one carefully reading the devises and the shifting clauses, it must appear quite clear that none of the sons, except *Thomas*, the first, could be in possession of two of the estates together. The Appellant, who took the *Wrightington* estate, assumed the name and arms of *Dicconson*, which he has discontinued to use, and instead of them he has taken the name and arms of *Scarisbrick*, and entered into possession of that estate, whereupon he should have given up the *Wrightington* estate as well as the name and arms attached by the testator to that estate, as the two estates could not unite in any of the sons except the eldest. The testator's intention as to the severance of these estates is quite clear.

It also appears from the jointuring clauses that the intention was to prefer male issue to females, and the eldest to the youngest, whether male or female. Powers of portioning and of jointuring were given to each son, out of his own estate,—in all events the three estates were to be kept distinct in three females, except only in the event of their coming to the eldest son under the limitations of the will.

The principle of construction on which the judgment of the Master of the Rolls proceeded was, that you cannot depart from the clearly expressed intention in one part of the will, unless you find a different intention as clearly expressed in another part of it. The Appellant has under the limitations of the will succeeded to the *Scarisbrick* estate. There is no younger son to take the other estates, but there are

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daughters—younger daughters, and younger than the Appellant, not in age, but in limitation. When *William* died, there was a younger son in point of age, the Appellant, and he properly succeeded to the *Wrightington* estate in place of *William*. But it is contended that the will is to be construed distributively *referendo singula singulis*. Those words are used in *Cook v. Gerrard* (b), good phrases, but without application. No illustration can make it more clear than the words of the *Wrightington* shifting clause taken by themselves, that, when a younger son succeeds to the *Scarisbrick* estate, and there is no other younger son, then a daughter succeeds to the *Wrightington* estate, the intention being that sons take before daughters, the eldest son taking before a younger, the issue of each taking before the others, the estates not to go over until all the sons and daughters of testator and their issue are extinct. Suppose *Thomas* to have been in possession of the *Scarisbrick* estate; *William*, of the *Wrightington*; and *Charles*, of the *Eccleston* estate; and that *Thomas* died leaving a daughter, in which event *William* would succeed to the *Scarisbrick* estate, and *Charles* to the *Wrightington*; in that case would *Charles* continue to hold the *Eccleston* estate with the *Wrightington* estate, and the daughter of *Thomas* be wholly unprovided for? Yet that is a state of circumstances which might arise from the construction contended for in behalf of the Appellant. Supposing further, that *Charles* dies leaving a daughter, and *William* is in possession of the *Scarisbrick* estate, and there is no younger son, then this state of facts might arise,—the daughter of *Thomas*, the eldest son, would

(b) 1 Saund. 181.

be without any estate, *William* would have the *Scar-
risbrick* estate, and the daughter of *Charles* would
have the other two estates. Surely your Lordships
would not do such violence to the plain construction
of the will, producing a result that was never con-
templated by the testator. Suppose that *Thomas* died
leaving granddaughters, children of a deceased son,
William living, and that *Charles* died leaving daugh-
ters only, *William* in that event would succeed to the
Scarisbrick estate. There would be nothing to revive
the limitations of the *Wrightington* estate in favour of
William, but it would go to *Thomas's* granddaughters,
while there may be sons of his daughters. Suppose
another case—*William* also dying, leaving daughters;
if they should fail, the estate would go to the testa-
tor's daughters, while a son was living. These and
other results equally inconsistent might follow from
the construction contended for by the Appellant.
That construction would defeat the intention of the
testator in three cases out of four of any number
of supposable cases. For him it is argued that
“younger” applies to younger in age only, and not
to “posterior in limitation.” But it is now quite
settled that a daughter, who is an eldest child, will
take a provision for younger children. In wills and
settlements, it is not seniority of age, but of succession
that we are to look to. Lady *Hunlocke*, testator's
eldest daughter, is excluded as well by the construc-
tion contended for by the Appellant as by that of the
Respondents. Whether the testator intended to dis-
inherit her or not, she is excluded from the succession
by any construction that may be put on the will.
There are provisions in the will applicable to *Thomas*,
the eldest son, which are not extended to the other
sons or their issue. If any issue of the person in

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possession of the *Wrightington* estate succeed to the *Scarisbrick* estate, the *Wrightington* estate is to go over to the person next beneficially entitled, which is not so in the shifting clause of the *Eccleston* estate; the intention being, that the two former estates should not unite in any one. The distributive construction contended for would not effect the intention ascribed to the testator by the Appellant.

This case has undergone three different arguments and examinations by very careful Judges; first, in the duchy of *Lancaster* in 1823, the judgment there being afterwards on deliberation adopted by the Master of the Rolls, and approved of by the Lord Chancellor. The main argument for the Appellant, that the shifting clauses were to operate from son to son and from daughter to daughter, and not from son to daughter, &c., could not sustain that construction, except by the interpolation of words in the will, which was attempted in the Court below, but unsuccessfully. All that was required to sustain the judgment of the Court below was, to read the words “younger daughter,” as younger or posterior in limitation, and to apply it to daughters as well as to sons, in which sense the word “younger” has been already taken and acted upon as being posterior in limitation in this very will. The construction contended for by the Appellant, on whatever ground it may be put, might and would in the events which have happened, as well as others which might have occurred, not only lead to consequences and to an enjoyment of the estates which the testator could never have intended or contemplated, but would necessarily require some of the express directions and provisions of the will to be struck out and rejected, and others to be modified and altered in a manner and to an extent which can neither be supported or justified on principle or authority. The case of *Stanley*

v. *Stanley* (c) is not applicable to the point for which it was cited. That case shows that a life estate may be forfeited by the tenant for life, but his forfeiture could not affect the remainders, because the trustees would enter to preserve.

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The reverter clause is no part of the shifting clause, and ought not to be read with it. Suppose in the words "any younger son or daughter," the word "younger" referred to daughter as well as to son, still it may be contended that the meaning is "younger" in the order of succession to the estates. And in that sense the eldest son even is to take in the limitations of the *Wrightington* and *Eccleston* estates; he is younger, that is, posterior to the other sons in succession to those estates. And to that effect is the passage in Sir *E. Sugden's* Treatise on Powers, 2d vol. p. 292, last edition: "These cases profess to go merely upon the intention, that the child is not a younger child within the power, and by parity of reason, where an eldest child is in effect a younger child *with reference to the estate*, he may be an object of a power to appoint to younger children, as where an estate is settled on the son, and where there is an eldest daughter, then, although in point of age the daughter is eldest, yet it is well settled that the son, as he takes the estate, though not so by primogeniture, shall be considered an eldest child, and the daughter, though eldest, shall be taken as a younger child; so an elder son unprovided for may take under a provision for younger children; for it is to the intention, and not to the words *elder* or *younger*, that the Court adverts." In that sense Miss *Eccleston*, though not younger in age than the Appellant, answers the description in the shifting clause; she is younger

(c) 16 Ves. 491.

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in reference to the succession to the estate. It is submitted that on the two points, viz. that the words cannot be construed distributively without inserting other words, and that “younger” does not mean younger in age, but in limitation, the judgment of the Master of the Rolls was right.

The *Lord Chancellor* :—My Lords, although this will does not devise legal estates, it directs the disposition of the property in such a form of words that the construction of it will be the same as if it had been a devise of legal estates; and the only difficulty is how to frame the questions for the consideration of the learned Judges to enable them to give answers. I apprehend there are two ways of doing it; one by converting the language of the will into a devise of legal estates, which would require an alteration of the words, a course to be avoided if possible, and the other is this,—after stating the exact words of the will, to state that the settlement was executed in strict conformity with the direction of the shifting clauses, the creations of the trusts, the powers of jointuring and charging, and the direction for using the arms and names of *Scarisbrick* and *Dicconson*. That statement will raise the questions for the consideration of the Judges, as if it had been a devise of legal estate. I think the proper course is to state the facts as they are found in both the printed cases, upon which there is no doubt or difference; and pursuing that course, I propose that the questions should be stated in this way :—

The testator, at the time of making his will and codicils, had seven children, who were born and named in the following order: *Thomas, Ann, Mary, Elizabeth, Catherine, William, Charles*. The testator never had any other child. He made his will and codicils in the words in which they are to be found in

the appendix to Appellant's case. The testator's uncle, *Thomas Dicconson*, died without issue in the testator's lifetime. *William*, his second son, also died in his lifetime, without issue. Shortly after the testator's death, *Thomas*, the eldest son, obtained the Royal licence to take and use the surname and arms of *Scarisbrick*, and entered into possession of that estate; *Charles* was at that time an infant, but the Royal licence was obtained for him to take and use the name and arms of *Dicconson*, and upon attaining the age of 25 years, he entered into possession of the *Wrightington* estate. *Thomas*, the eldest son, died without issue, whereupon *Charles* obtained the Royal licence to take and use the surname and arms of *Scarisbrick* only, which he accordingly took, and entered into possession of that estate, and he relinquished and intends no longer to use the name and arms of *Dicconson*. *Ann*, *Mary*, *Elizabeth*, *Catherine* and *Charles* are still living. *Ann* married *Sir Thomas Windsor Hunlocke*, bart., in the testator's lifetime, and is now his widow, and has issue one son and no other child. *Charles* has never been married. *Mary* has never been married. *Elizabeth* married *Edward Clifton*, and has issue a son and other children. The testator's widow died some time since. A settlement was executed in strict conformity with the testator's direction; the shifting clauses, the declaration of the trusts of the terms, the powers for jointuring and charging, and the directions for taking and using the arms and names of *Scarisbrick* and *Dicconson*, being in the words used by the testator. The questions to be put to the learned judges are:—

- 1st. Who is entitled to the *Wrightington* estate?
- 2d. Who is entitled to the *Eccleston* estate?

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Mr. *Justice Park*:—Two of the learned Chief Judges of *Westminster* Hall, being Peers of Parliament, and the Lord Chief Justice of the Court of Common Pleas, having been necessarily absent at the argument, the duty devolves upon me of declaring to your Lordships the opinion of my learned brothers and myself upon the questions propounded to us by your Lordships for our consideration, and I am happy to say that upon the opinion to be given we are unanimous.

The questions proposed to us are two, namely, first, Who is entitled to the *Wrightington* estate? and the second, Who is entitled to the *Eccleston* estate? The reasoning applicable to the one question decides the other also. These questions arise out of a very complicated will, which questions were certainly decided by two very eminent Judges, Sir *John Leach*, formerly Master of the Rolls, and the noble and very learned Lord Chancellor *Lyndhurst*, upon an appeal to his Lordship from Sir *John Leach*.

The papers being all before your Lordships, it would be a waste of your time, as well as most fatiguing, to read the whole of the will and codicils, for they are fully set forth in the appendix to the Appellant's case. But it may be material to call the attention of your Lordships to the state of this family, as stated in the preamble to the questions submitted to the Judges. The testator, at the time of making his will and codicils, had seven children, and this was their order of seniority, *Thomas, Ann, Mary, Elizabeth, Catherine, William* and *Charles*, the Appellant, so that *Thomas* was the eldest in order of birth, and the second and third sons came after the four daughters. The testator's uncle, *Thomas Dicconson*,

died in the lifetime of the testator and without issue ; *William*, the second son of the testator, died also in his father's lifetime without issue. Shortly after testator's death, in 1809, *Thomas*, his eldest son, obtained the Royal licence to take and use the name and arms of *Scarisbrick*, instead of his former name of *Eccleston*, and entered into possession of the *Scarisbrick* estate. *Charles*, the Appellant, was at that time an infant, but the Royal licence was also obtained for him to take and use the name and arms of *Dicconson*, and upon attaining the age of 25 years, he entered into possession of the *Wrightington* estate. *Thomas*, the eldest son of the testator, died without issue in 1833, whereupon *Charles* obtained the Royal licence to take and use the name and arms of *Scarisbrick* only, which he accordingly took, and entered into possession of that estate, and he has relinquished and ceased to use the name and arms of *Dicconson*. The daughters, *Ann*, *Mary*, *Elizabeth* and *Catherine* are still living ; *Ann*, who married Sir *Thomas Hunloke*, is now a widow, and has one son and no other child ; *Mary* is unmarried ; *Elizabeth* married *Edward Clifton*, and has issue a son and other children ; *Charles*, the Appellant, has never been married. A settlement was executed in strict compliance with the testator's directions, the shifting clauses, the declaration of the trusts of the terms, the powers for jointuring and the directions for taking and using the arms and names of *Scarisbrick* and *Dicconson*, being in the words used by the testator.

Such were the circumstances of this family, and from that state of things the questions arise. The testator appears, in making the disposition of his estates, to have had two principal objects in his contemplation ; first, to prefer his sons and all their issue

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male and female, to all his daughters and their issue; second, to keep his three estates of *Scarisbrick*, *Wrightington* and *Eccleston*, separate, and to constitute three families. Both these objects could not be absolutely secured in all events; and the second object, that of constituting three families, is purposely departed from in case of the two younger sons dying without issue, and the eldest surviving, or leaving issue surviving, them. There are also circumstances in the disposition to the daughters from which it may be inferred, that the testator did not contemplate the devolution of an estate to any one of them, so long as there was a son or issue of any son living. After the decease of all the sons without issue, the principal estate, *Scarisbrick*, is given to the eldest daughter, *Ann*, and *Wrightington* estate is given to the second daughter, *Mary*, and no interest in the *Wrightington* estate is given to *Ann*, till after the failure of issue of all her sisters. Now if the testator contemplated the shifting of the *Wrightington* estate to any of his daughters, upon the event of a son possessed of that estate succeeding to the *Scarisbrick* estate, it is very difficult to account for his not having provided for the *Wrightington* estate shifting to her. But if he did not contemplate any estate coming to his daughters till after the issue of his sons was extinct, the provision, as it stands, is sensible and consistent; for, upon failure of issue of the sons, *Scarisbrick* would come to *Ann*, and *Wrightington* to *Mary*. She (*Mary*) might afterwards succeed to *Scarisbrick*, and then by the provision, as it stands, *Wrightington* would shift to *Elizabeth*. Thus the issue male and female of the sons would be preferred to the daughters and their issue; as long as any issue of more sons than one remained, *Scarisbrick* and *Wrightington* would be

kept distinct, and upon failure of issue of all the sons, the three estates would devolve separately upon the daughters. The provision by which, in case all the sons of the testator but one should die without issue, the *Scarisbrick* estate should be charged with an annuity of 1000 *l.* in addition to the 600 *l.* per *annum* already charged upon that estate for his wife, affords a strong proof of the testator's meaning and understanding, that in that event a younger as well as an elder son surviving would have more estates, and therefore could well pay the increased jointure.

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At the end of the shifting clause, the testator provides for a reverter in case the *Wrightington* estate should have shifted to *Charles*, *Elizabeth* or *Catherine*, but the name of *Mary* is omitted. How is this to be accounted for, if the testator supposed that the *Wrightington* estate might have come to *Mary* by shifting from *Charles*? It might come to *Charles* by shifting from *William*, and to *Elizabeth* by shifting from *Mary*. It could not shift from *Ann*, because *Ann* would not take it under the limitation; and the reverter clause proceeds evidently upon the supposition that it could not shift to *Mary* under the shifting clause. To make the whole consistent, we must suppose the intention to be, that the estate was only to shift from sons to sons, and from daughters to daughters.

It now remains to be considered, whether the words of the shifting clause will bear that construction. The event has happened, that *Charles* being entitled to the *Wrightington* estate, has by the death and failure of issue of his brother, *Thomas*, become possessed of the *Scarisbrick* estate, and the question is, whether when he became so possessed there was living any younger son or daughter of the body of the

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testator within the meaning of the testator ; in other words, was *Mary* such a daughter as the testator contemplated ? She was certainly a daughter of his body. But the phrase “any younger son or daughter,” will not bear the construction of any son or *any* daughter, which would include *Ann*, the eldest daughter, who was manifestly intended to be excluded. The plain common sense meaning of “*younger son or daughter*,” is “*younger son or younger daughter*,” and, unless a plain intention to the contrary can be shown, that construction ought to prevail. Assuming then the words to mean “younger daughter,” to what does that word “younger” refer ? Does it mean younger than the eldest brother or sister, or younger than the person from whom the estate has shifted ? The language of the reverter clause appears to afford the answer. In that clause the testator must be supposed to speak of the failure of issue of the same persons to whom the estate would shift under the shifting clause ; for he there says, “who should be younger than the son or daughter from whom the estate should have shifted.” This language is not applicable to any of the daughters named in the will, all of whom are older than *Charles* ; none of them, therefore, can be intended as persons to whom the estate could shift from *Charles*.

The shifting and reverter clauses of the estate of *Eccleston* appear to have been framed upon similar views of the case ; for in those clauses the name of *Mary* is omitted as well as *Ann*.

Charles has succeeded to the *Wrightington* estate, and *Elizabeth* is next in the limitation of the *Eccleston* estate, and if there be a younger daughter living in the meaning of the will, *Elizabeth* is entitled to that estate. But according to the reverter clause, the daughter so living must be a daughter *younger* than

the son or daughter from whom the estate shifted. *Elizabeth* is not younger than *Charles*, and though she is younger than *Ann* and *Mary*, the *Eccleston* estate cannot shift from either of them to *Elizabeth*, to whom it is given in preference to either.

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It is evident indeed from the language of the will, that the testator contemplated the birth of other sons and daughters who would be younger than *Charles*; and if the existence of such a younger daughter would cause the estates to shift from *Charles* to *Mary* or *Elizabeth*, it is difficult to find any good reason for an intention that it should not shift in consequence of the existence of *Catherine*, who is younger than *Elizabeth*, though older than *Charles*. It is very improbable, however, that the testator should have intended the shifting to *Mary* or *Elizabeth* to depend upon the existence of a person, whether born or to be born, who would have no interest in that event. If, indeed, by *younger* he meant posterior in limitation, it would apply to all the daughters. But this, as I have said to your Lordships, is not the natural construction of the word "*younger*;" and if the natural construction is to be departed from, that construction which best supports the apparently primary intention of the testator ought to prevail, provided it be consistent with the rules allowed by law. Now if the words "younger son or daughter" be construed distributively with reference to the persons from whom the estate is to shift, that is, "a son younger than a son, or a daughter younger than a daughter, from whom the estate is to shift," the primary intention of preferring the sons and all their issue to the daughters and their issue, will be preserved without violating any recognized principle of construction.

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admit of a construction which will effectuate that intention.

We are therefore of opinion, that as long as *Charles* lives neither of the shifting clauses can take effect, and therefore, in answer to the questions proposed by your Lordships, we say that *Charles* retains both the *Wrightington* and *Eccleston* estates.

The *Lord Chancellor* :—My Lords, having listened to the opinion of the learned Judges in this case, it will become the duty of your Lordships to consider the effect of that opinion, and to determine the case, and for that purpose I would move your Lordships that the further consideration of this case be adjourned.

Adjourned accordingly.

July 24.

The *Lord Chancellor* :—My Lords, this case was an appeal from a decree pronounced in the Court of Chancery upon a bill filed by *Mary Eccleston*, *Edward Clifton* and *Elizabeth* his wife, and *Thomas Clifton*, against Lord *Skelmersdale* and *Streynsham Master*, and *Charles Scarisbrick*, in which they prayed “that the rights and interests of all parties, under the said will and first codicil, in the said *Wrightington* estates subsequently to the term of 2000 years directed to be limited therein, and in the *Eccleston* estates, might be declared and ascertained, and that the trustees, the Respondents, Lord *Skelmersdale* and Mr. *Master*, might be directed to pay and apply the rents and profits conformably thereto.”

My Lords, the real question in the cause was, whether the shifting clauses in the will, under which the parties claim, had or had not taken effect in the events which had happened. The cause came on to

be heard before his Honor, the late Master of the Rolls, and he by his decree declared, "that in the events which had happened upon the death of *Thomas Scarisbrick*, the Appellant having succeeded to the *Scarisbrick* estate, the Respondent, *Mary Eccleston*, as next in order of succession, after the limitation to the Appellant and his issue, became entitled to the *Wrightington* estate, and that the Respondent, *Elizabeth Clifton*, as the next in order of succession to the *Eccleston* estate, became entitled to the *Eccleston* estate," and then the consequential directions were given.

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The case then went from the Rolls by appeal to the then Lord Chancellor, Lord *Lyndhurst*, and the decree which had been pronounced at the Rolls was by him affirmed.

My Lords, when the case came before your Lordships, it was thought to be a case which required the assistance of the Judges, and accordingly the case was argued before the learned Judges, and two questions were submitted for their consideration. After stating what had taken place in the family, the two questions which were put were, Who was entitled to the *Wrightington* estate, and who was entitled to the *Eccleston* estate? The real question was, whether upon the death of the elder brother all the estates vested in the younger brother, or whether the shifting clause took effect and carried over to the sisters the *Wrightington* and *Eccleston* estates?

Your Lordships have had the benefit of hearing the unanimous opinion of the Judges, the result of their consideration, and that opinion was, "We are therefore of opinion, that as long as *Charles* lives neither of the shifting clauses can take effect, and therefore, in answer to the questions proposed by your Lordships,

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we say that *Charles* retains both the *Wrightington* and *Eccleston* estates."

My Lords, I fully concur in the opinion the learned Judges expressed, and I am authorized by the noble and learned Lord (*d*), who heard the case in the Court of Chancery, to say, that having attended to the arguments addressed to your Lordships at the bar, and the reasons stated to your Lordships by the learned Judges, he is satisfied that the Judges have come to a right conclusion. Under these circumstances it is unnecessary to occupy your Lordships' time by restating the reasons you have already heard stated, and I propose to your Lordships now to reverse the decree pronounced at the Rolls; and in order to give effect to the conclusion which your Lordships have adopted, to which the Judges have come, the right course will be to move that the bill be dismissed, inasmuch as the bill was filed by the sisters claiming, in the events which had happened, that the estates had come to them. The result of the opinion of the Judges is, that there is no foundation for that claim, and therefore the bill will be dismissed.

Mr. *Pemberton* :—Will your Lordships permit me to suggest that I do not apprehend that the dismissing of the bill would be the necessary consequence of that conclusion, and it is not the desire of any of the family that it should be done. The sisters claim in remainder; it is clear they have an interest under the will, and they claim to have the will executed according to the trusts it contains.

The *Lord Chancellor* :—The declaration will be, that the estates remain in *Charles*, and a settlement be executed conformably to it.

(*d*) Lord *Lyndhurst*.

Mr. *Pemberton* :—The estates are in the trustees, and the trustees will have to execute a settlement according to the declaration, directing that the estates shall be limited to *Charles*, according to your Lordship's opinion.

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The *Lord Chancellor* :—If that is the object of the bill, that is the right course.

Mr. *Pemberton* :—Yes, my Lord, and that was the object of the Appellant; it was impossible to execute a conveyance of the legal estate till the opinion of the Court had been pronounced upon the effect of these difficult clauses. There will be a settlement executed in the way your Lordships think the estates should be limited.

The *Lord Chancellor* :—The latter part of the decree of the Master of the Rolls will be right: “ And his Honor did order that it should be referred to the Master to approve of a proper settlement to be made of the *Wrightington* and *Eccleston* estates to the uses and upon and for the trusts, interests, and purposes in the will mentioned, regard being had to the declarations hereinbefore made.”

Mr. *Pemberton* :—Yes, my Lord; it is only an appeal against so much of the decree as declares the right to be in the sisters. Your Lordships reverse that declaration, but there is no appeal from that part of the decree which directs a settlement to be executed.

The *Lord Chancellor* :—This part of the decree cannot stand, “ And it was ordered that the Respondents, the executors, and trustees of the testator, should account for the rents and profits of the estates.”

Mr. *Pemberton* :—No, my Lord, that must be altered.

Mr. *Tinney* :—We have drawn out a short sketch

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of the decree, which, perhaps, your Lordships will permit me to read.

He read them.

Mr. *Pemberton*:—With respect to these proposed minutes, one can hardly tell the effect of them.

The *Lord Chancellor*:—It is impossible we can deal with them without much consideration on your part as well as on the part of the House; Mr. Tinney will hand them over to you.

Mr. *Pemberton*:—The result will be to decide according to the opinion of the Judges, and refer it to the Court of Chancery to give effect to those declarations.

The *Lord Chancellor*:—That would be by declaring that the shifting clauses had not taken effect, and that *Charles* is entitled to the possession of these two estates, and refer it back to the Court of Chancery to prepare the settlement.

Mr. *Pemberton*:—I should hope your Lordships would think that the costs should come out of the estates. The suit was necessary, in order to carry into effect the trusts of the will. The trustees could not do it without the decision of the Court.

Mr. *Tinney*:—When the appeal was heard before Lord *Lyndhurst*, he dismissed it without costs; each party paid his own, and I should think that would be the fit thing here.

Mr. *Pemberton*:—I think not; the bill was necessary to enable the trustees to carry the will into execution, and as *Charles* has succeeded to 35,000*l* a year, it is not too much to ask that his estate should bear the costs.

The *Lord Chancellor*:—It is a suit to carry the trusts into effect, and for the benefit of all parties,

and after what has taken place, it cannot be said it is not a proper case to bring before the Court.

Mr. *Pemberton* :—I hope your Lordship will order the costs of the proceedings to be paid out of the *corpus* of the estate.

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Mr. *Tinney* :—Lord *Lyndhurst* gave no costs; the costs of the Court below may be ordered to be paid out of the estate, but the costs of the appeal should not be ordered in a way more unfavourable to us, now that we have succeeded.

Mr. *Pemberton* :—It is not an adverse litigation, but to carry into effect the trusts of the will, which are so vaguely and obscurely framed that it is impossible for the trustees to act, except under the direction of the Court.

The *Lord Chancellor* :—The original decree gave the costs out of the estate, and I think, under the circumstances, that is the fit course to be pursued.

Mr. *Tinney* :—Your Lordship then will give them the costs of the appeal before Lord *Lyndhurst*?

Mr. *Pemberton* :—And the costs of the appeal here, out of the *corpus* of the estates?

The *Lord Chancellor* :—Yes.

It is *ordered* and *adjudged* by the Lords, &c. that the order of the Lord Chancellor, affirming the decree of the Master of the Rolls, be and the same is hereby reversed; and that so much of the said decree of the Master of the Rolls as declares that upon the death of *Thomas Scarisbrick*, the plaintiff *Mary Eccleston* became entitled to the *Wrightington* estate, and the plaintiff *Elizabeth Clifton*, the wife of the plaintiff *Edward Clifton*, became entitled to the *Eccleston* estate; and also so much of the same decree as directs that in the settlement to be made of the said estates, regard is to be had to such declarations, and also so much of the same decree as directs the defendants, *Edward Lord Skelmersdale* and *Streynsham Master*, to account for the rents and profits of the said *Wrightington* estate, from the death of the said *Thomas Scarisbrick*, to the said *Mary Eccleston*, and for the rents and profits of the said *Eccleston* estate, from the death of the said *Thomas Scarisbrick*, to the said *Edward Clifton* in right of *Elizabeth Clifton*, his wife, be and the same is

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The *Lord Chancellor* :—The original decree gave the costs out of the estate, and I think, under the circumstances, that is the fit course to be pursued.

Mr. *Tinney* :—Your Lordship then will give them the costs of the appeal before Lord *Lyndhurst*?

Mr. *Pemberton* :—And the costs of the appeal here, out of the *corpus* of the estates?

The *Lord Chancellor* :—Yes.

It is *ordered* and *adjudged* by the Lords, &c. that the order of the Lord Chancellor, affirming the decree of the Master of the Rolls, be and the same is hereby reversed; and that so much of the said decree of the Master of the Rolls as declares that upon the death of *Thomas Scarisbrick*, the plaintiff *Mary Eccleston* became entitled to the *Wrightington* estate, and the plaintiff *Elizabeth Clifton*, the wife of the plaintiff *Edward Clifton*, became entitled to the *Eccleston* estate; and also so much of the same decree as directs that in the settlement to be made of the said estates, regard is to be had to such declarations, and also so much of the same decree as directs the defendants, *Edward Lord Skelmersdale* and *Streynsham Master*, to account for the rents and profits of the said *Wrightington* estate, from the death of the said *Thomas Scarisbrick*, to the said *Mary Eccleston*, and for the rents and profits of the said *Eccleston* estate, from the death of the said *Thomas Scarisbrick*, to the said *Edward Clifton* in right of *Elizabeth Clifton*, his wife, be and the same is

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hereby also reversed ; and it is declared that according to the true construction of the will of the testator, in the events which have happened, the defendant *Charles Scarisbrick* has been, since the death of the said *Thomas Scarisbrick*, and still is entitled in possession for his life without impeachment of waste to the said *Wrightington* estate and the said *Eccleston* estate respectively : and it is further ordered that the Master, in approving of a proper settlement to be made of the said *Wrightington* estate and *Eccleston* estate respectively, do have regard to the declaration of this House hereinbefore made ; and it is further ordered that the Master, in taxing all parties their costs of this suit as directed by the said decree of the Master of the Rolls, do include therein and do tax all parties their costs of the re-hearing of the said suit before the Lord Chancellor, and of this appeal, the costs of the defendants, the trustees, to be taxed as between solicitor and client : and it is further ordered that the Master do apportion the amount of all the said costs between the said *Wrightington* and *Eccleston* estates according to their respective values, and that the amount apportioned to each of the said estates be raised by mortgage or sale of a sufficient part of the same estates respectively, and that any of the said parties be at liberty to apply to the Court of Chancery to carry the aforesaid declarations and directions into effect, as there shall be occasion.—
70 Lords' Journ. 611.

A P P E A L

FROM THE COURT OF SESSION.

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 July 5. 9. 12.
 20.

ADAM MONTEITH and Others - - - *Appellants.*

ROBERT M'GAVIN - - - - - *Respondent.*

The lists of persons qualified to elect or be elected to municipal offices in the burghs of Scotland, must be made up on the 16th of September in each year by the town-clerk of each burgh, in conformity with the sheriffs' lists of parliamentary voters for such burghs.

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The town clerk has no authority to alter the burgh lists then made up, even upon intimation that the sheriffs' lists have been subsequently altered by the Court of Review, but such burgh lists must remain until the 16th of September in the following year, and then be altered in conformity with the then existing parliamentary lists for the burgh.

Where, therefore, a person's name stood on the sheriffs' list on the 16th of September, and was transferred by the town clerk to the burgh list on that day, such person was entitled to elect and be elected to a municipal office in virtue of so appearing on the burgh lists, though before the period of the municipal elections his name had been, by the decision of the Court of Review, removed from the parliamentary lists made up by the sheriff.

Qu.? Whether in such a case his right to elect or be elected can properly be discussed in the courts of Scotland by a bill of suspension and interdict.

THE questions intended to be raised for decision in this cause were, first, Whether an application to the Court of Session by a Bill of Suspension and Interdict, to try and determine the validity of the election of a member of the town council of a royal burgh,

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was or was not a competent mode of procedure? And secondly, Whether (assuming that it was) the election of the respondent to the office of one of the town-councillors of the royal burgh of *Glasgow*, was or was not a legal and valid election (a)?

(a) The statutes that came under consideration in this case were the following: 3 and 4 Will. 4, cap. 76, s. 1, "That from and after the period when this Act shall come into operation, the right of electing the town-council in all such burghs respectively (except in those contained in schedule F. to this Act annexed) shall be in and belong to all such persons, and to such only (except as hereinafter excepted) as are or shall be qualified, as owners or occupiers of premises within the royalty, whether original or extended, of any such burgh, to vote in the election of a Member of Parliament for such burgh, by virtue of an Act passed in the 2d and 3d year of the reign of his Majesty King William 4, entitled an Act to amend the representation of the people in Scotland, and as are duly registered as such voters in the registers, by the said recited Act appointed to be kept, and also in all such persons who are possessed of the qualifications described in the said recited Act, in respect of the property or occupancy of any house or other subject therein described, of the value thereby required, within the royalty of any royal burgh not now entitled to send Members to Parliament. Provided always, that all such electors who may be qualified as herein before provided, shall have resided for six calendar months next previous to the last day of June in this and all future years, within the royalty of such burgh, or within seven statute miles of some part thereof; provided also, that no person shall be entitled to vote who has been in the receipt of parochial relief, or who has been a pensioner of any corporation within twelve months of any such annual election, or for any burgh of which he may have been town-clerk at the time of such election, or of making up the list or roll of electors with a view to such elections."

Sec. 22.

Sec. 23.

By the 2d and 3d Will. 4, c. 65, a new qualification is introduced for electors of Members of Parliament both in counties and in burghs, and a mode of ascertaining that qualification is established by means of an annual registration, to be conducted in the manner therein pointed out by the sheriffs of the respective counties. For this purpose each sheriff is to hold an annual court of registration both for county and city voters, in which he is to decide all claims or objections on or before the 15th day of September in each year; and by the 23d section it is enacted, "That the sheriffs' judgments, granting or refusing registration, shall, so long as they remain unaltered, be conclusive of the rights of parties claiming or objecting as above, but that it shall be competent to any party considering himself aggrieved by any such judgment to appeal, and apply for an alteration thereof," in manner therein mentioned.

By section 25th it is provided that appeals from the sheriffs'

The royal burghs are regulated in their municipal system by the 3 & 4 Will. 4, c. 76. The burghs not royal are regulated by 3 & 4 Will. 4, c. 77.

In all the classes of burghs, the principle of the

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judgments on any annual registration shall be to the sheriffs liable in attendance at the Circuit Courts of Justiciary to which the different districts may belong; and it is enacted, "That the judgments of the said courts of review shall in all cases be final and conclusive, and liable to no process of review, and shall, whenever they reverse or vary the judgments of the sheriff appealed from, be warrants to him to alter or correct his registers in conformity thereto; and he shall, on such judgments being made known to him by the parties, alter and correct such registers accordingly."

Sec. 25.

By the same section it is provided that the cases thus brought under appeal shall be finally decided on or before the 20th of October in each year.

By the 4th section of the 3d and 4th Will. 4, c. 76, it is enacted, "That the respective town-clerks of each royal burgh shall, on or before the 20th day of October in the present, and on or before the 16th day of September in all future years, make up and complete a list or roll of persons entitled to vote in the election of the common council of such burgh, in manner following, viz. the town-clerk of each burgh, which in virtue of the said recited Act, sends, either severally, or in combination with any other burgh or burghs, a Member or Members to Parliament, shall make up and complete such list by transferring from the Parliamentary register for such burgh to such list or roll, the names of all the voters contained in such register entitled to vote in the election of a Member of Parliament, as are so registered in respect of properties situated within the royalty, whether original or extended, of such burgh, without requiring any claim, or admitting any objections against the persons so registered."

By sections 7, 8, and 15, it is provided that certain burghs, of which Glasgow is one, shall make their elections by wards, and that on the first Tuesday of November in each year, "the electors qualified and entered on the list or roll made up as aforesaid, shall choose from among such *of their own number* as either reside within the boundaries assigned to such burgh by the said recited Act, or as may carry on business, or reside within the royalty thereof, such a number of councillors as, by the set or usage of each burgh respectively, at present constitutes the common council of such burgh."

The case of parliamentary burghs, not royal, is thus provided for: s. 2, 3 & 4 Will. 4, c. 77, enacts, "that the right of electing the councillors in each of the said burghs and towns shall be in all the persons who are qualified to vote for a Member of Parliament for such burgh or town whose names shall be on the register directed to be kept by the said recited Act (2 & 3 Will. 4, c. 65), and which shall have been completed in terms thereof up to the period

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new municipal franchise is substantially the same. No peculiar franchise for municipal purposes has been contrived, but the rule is, that the municipal franchise shall be in the same class of persons on whom the Parliamentary urban franchise had before been conferred by the Reform Act, 2 & 3 Will. 4, c. 65.

When the first Parliamentary register for *Glasgow* was framed, the Respondent was registered in virtue of a joint tenancy and occupancy of a warehouse in *Brunswick-street*, possessed by the firm of *Robert M'Gavin & Company*, of which he was one of the principal partners, and likewise in virtue of his sole tenancy and occupancy of his dwelling-house in *Monteith-row*. He voted without objection upon that qualification, at the first election of Members of Parliament.

The firm of *Robert M'Gavin & Son* (of which the Respondent is the principal partner) entered at *Whitsunday* 1833 into possession as tenants of a warehouse or counting-house in *George-square*, which they continued to occupy until the 28th of *May* 1837. Those premises were of such a yearly value as to afford the Respondent an ample qualification as a joint tenant and occupant. At the proper time, the Respondent lodged a claim to be registered as an elector, in virtue of his joint tenancy and occupancy of the former premises, and also of the new premises in succession; and he was duly registered accordingly.

At the first election under the Municipal Reform Act, the Respondent was chosen to be a councillor for the first ward of the royal burgh of *Glasgow*, conformably to the provisions of the statute. He was

thereby directed next previous to the time hereinafter appointed for the election of such councillors; and such register, so completed from time to time, shall be, and be deemed to be, the register of electors of the councillors for such burghs or towns respectively."

one of the two councillors who went out of office at the end of the first year, but was re-elected for the same ward, and was continued in office, without objection, until there was presented to the Court of Session the application for a suspension and interdict, now under discussion.

Throughout the same period, the Respondent voted without challenge at different Parliamentary and municipal elections, occurring up to the end of *May* 1837.

The copartnery of *Robert M'Gavin & Son* having, at *Whitsunday* 1837, removed from their warehouse in *George-square*, to another in *Cochrane-street*, the Respondent lodged a claim to be registered anew. His claim was made in virtue of his tenancy and occupancy of his warehouse in *Cochrane-street*, and of that in *George-square* in succession.

The Respondent himself prepared and lodged his claim without having employed an agent. The claim was objected to, argued before the sheriff, and admitted by him, and the Respondent's name was inserted in the registry of Parliamentary voters before the 15th *September* 1837.

Conformably to the express provisions of the Royal Burgh Act (3 & 4 Will. 4, c. 76), the town-clerks, on the 16th *September*, made up and completed the list or roll of persons entitled to vote in the election of the common-council of the burgh, by transferring from the Parliamentary register to that list or roll, the names of all the voters contained in such register entitled to vote for a Member of Parliament. The name of the Respondent was one of those which was then so transferred, and in consequence he was registered as a qualified elector, in terms of the statute. The decision of the sheriff was, however, objected to, and as

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the statements in the case shewed his claim to vote was rejected on the 4th of *October* by the court of appeal.

On the 5th of *October* 1837, a motion was made and carried in the town-council of *Glasgow*, in the absence of the Respondent, for production of the roll or list of municipal electors, made up and completed by the town-clerks on or before the 16th of *September* preceding. The object of that motion was to ascertain whether the Respondent's name was included in that list. On production of the list, it was ascertained that the Respondent's name had been regularly inserted in it, by means of the statutory transference from the Parliamentary register, which had been made up by the sheriff on or before the 16th of *September*.

Agreeably to the statutory rotation, it was the Respondent's turn to go out of the town-council previously to the last election; but he again became a candidate at the annual election which was to take place on the 7th of *November*. The opposite party served upon the town-clerks a requisition and protest, calling on them to make certain alterations in the list or roll of municipal electors made up and completed by them in terms of the statute, in order to bring it into conformity, as was alleged, with the Parliamentary register as finally settled by the judgments of the court of review. The town-clerks, in their answer to the requisition and protest, stated in detail the mode according to which they had, from the commencement of the operation of the Municipal Reform Act, proceeded to make up and complete their roll of electors, and declared that, conformably to the statutory injunctions, their rule and practice uniformly had been to transfer, on or before the 16th of *September* in each year, the names of all the voters from the

Parliamentary to the municipal register, and that they never had, by reason of the decisions of the courts of appeal, altered the register thus made up.

The town-clerks having thus declined to make the alterations demanded, the complainers, on the day of election, presented to the Lord *Cuninghame*, ordinary upon the bills, a bill of suspension and interdict. The *Lord Ordinary* pronounced an interlocutor appointing it “to be intimated, and answers thereto to be lodged betwixt and *Wednesday*, the 15th current; and in respect of the novelty of the question, and of its importance as possibly affecting the validity of the elections and other acts of the new council, when completed, ordains the bill and answers to be printed, in order that the case may be reported to the Inner House as soon as possible, reserving consideration of the interdict till the bill and answers are advised.”

To this interlocutor the *Lord Ordinary* was pleased to append the following note: “The *Lord Ordinary* does not think he is entitled to give an interdict *de plano* against the reception of any councillor, as that might perhaps suspend the election of any new magistrates necessary to be supplied, and all the other acts of the new council, while such a proceeding might be attended with consequences, in a popular community like *Glasgow*, which cannot at present be anticipated.”

The election proceeded, and on the 7th of *November* the Respondent was elected by a majority of 464 electors to 331.

The poll-books were sealed up by the persons who had presided at the elections of the several wards, and taken the polls thereat, and were transmitted to the town-council, who on the lawful day, the 8th of *November*, declared “that *Robert M'Gavin* and *James*

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Turner, having had a majority of votes, were therefore duly elected councillors for the first ward of the said burgh." The Respondent received, on the same day, a written intimation from the town-clerks, that he had been duly elected a councillor, and a requisition that he should, in terms of the statute, appear and declare his acceptance of the office. These proceedings took place before the suspension was intimated.

On the 9th of *November*, "in presence of *Henry Paul*, esq., chief or senior magistrate of *Glasgow*, and of the town-clerks of the said city, appeared the following persons, who were elected councillors on *Tuesday*, the 7th of *November* instant," viz., the Respondent and several others. Mr. *David Stow*, merchant in *Glasgow*, also appeared along with a procurator, and protested that he had been duly elected a councillor for the first ward, therefore he ought to be inducted into the office, and that the council ought not to proceed to induct the Respondent. "The foregoing protest having been read over, Mr. *Stow* exhibited evidence of his being a burgess of this burgh, and offered to take the oaths required by law, upon induction into the office of councillor, but he was informed that Mr. *M'Gavin* having yesterday been duly declared councillor for the first ward, the oaths could not now be tendered to him."

Mr. *M'Gavin*, as a separatist, made his solemn declaration under 3 & 4 W. 4, c. 82, and then took his seat as a councillor.

In the bill of suspension and interdict the Appellants are described as duly qualified voters in the Parliamentary and municipal elections for the city of *Glasgow*. The prayer is, that the Respondent should be interdicted from encroaching upon the rights of

the complainers, from intruding himself into the town-council, or acting as a councillor, and that the magistrates and town-council, and their officers and servants, should be interdicted from receiving him as a member of council.

On the 29th of *November* 1837 the Lords of the First Division of the Court of Session having heard the case argued, pronounced an interlocutor, sustaining the competency of this bill of suspension and interdict; but, on the merits, refusing the bill itself.

The Appellants presented an appeal against that part of the interlocutor which refused the bill of suspension and interdict on the merits, and the Respondent in that appeal presented a cross appeal against that part which sustained the competency of the mode of proceeding by suspension and interdict.

Sir *W. Follett* and Dr. *Lushington* (Mr. *Monteith* was with them) for the Appellants:—The Respondent was not qualified to be an elector of *Glasgow*, and therefore not qualified to be a town-councillor. The sheriff had, in the first instance, decided that he had a right to a vote as a Parliamentary elector. There was then an appeal to the Court of Review, which decided against his right, and directed his name to be expunged from the register. That decision took place before the 20th of *October*. His name ought then to have been expunged from the list of municipal voters. The borough election was on the 7th of *November*, at which time the Respondent's name was no longer on the Parliamentary register. Notice of an objection on that ground was given to the parties interested in the municipal election, but they declared that if Mr. *M'Gavin* was elected they would admit him, and it was upon that declaration that the bill of

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suspension and interdict was filed (*b*). The intention of the Legislature to prevent persons who were not Parliamentary voters from being borough voters was admitted in the Court below, but it was insisted that that intention had not been carried into effect by the words of the statute. As to that which is the chief question here, Was Mr. *M'Gavin*, under the provisions of the Scotch Reform Act, competent to fill the office of town-councillor? The elections for *Glasgow*, which is a royal and parliamentary burgh, are described in the first section of the Municipal Reform Act. By that Act no person is entitled to vote for the town-councillors, who is not entitled to vote for the Parliamentary Members. Then, supposing the Respondent not to be regularly registered for voting at Parliamentary elections, he was not qualified to vote for corporation officers, or to be elected one. Here his name had been taken from the list of Parliamentary electors. But then it is said that that occurred after the proper officer had duly made up the list of municipal electors from the lists of Parliamentary electors, and that that having been once done the clerk has no power afterwards to alter it. There are two points on which the decision of that question will turn. First, whether the town-clerk ought not, when the names on the Parliamentary list were altered by the Court of Review, to alter his own lists in accordance with them; and, secondly, if he had not authority to do so, still, whether the person disqualified from voting, and therefore from being in the list of voters, could, in spite of such actual disqualification, elect or be

(*b*) The question of the competency of this mode of proceeding was fully argued, but as the Lord Chancellor expressly declined giving any opinion upon it, a report of that part of the argument has been deemed unnecessary.

elected a councillor. It must be admitted that there is no direct provision requiring the town-clerk to alter the burgess lists conformably to the decision made by the Court of Review upon appeals as to names in the Parliamentary lists. But still it is the plain intention of the statute that the decision of the sheriff is only to be carried into effect if in conformity with that of the Court of Review; and this intention has been so distinctly carried out, that the same regulations are made to apply to those boroughs which have and those which have not Parliamentary representation. In point of practice, there can be no doubt that the municipal lists were not actually made up while the Parliamentary lists were still under discussion in the Court of Review. The opportunity of altering the municipal lists existed therefore in the fullest manner. But even supposing that they were made up on the 16th of *September*, and that there are no provisions in the statute requiring the town-clerk to alter the lists, still it is clear that the persons not qualified are not entitled to vote, for otherwise improper persons might vote, and those whose franchise was affected thereby would be without any remedy. In this country it is clear that the Court of Queen's Bench would interfere to prevent an unqualified person from being on the list. As this question depends on the Reform Act for Scotland and the Scotch Municipal Act, both must be construed as statutes in *pari materia*. The meaning of the directions in the Municipal Act is that the town-clerk should, in the Parliamentary boroughs, make out the lists and complete them so far as he has materials. As there is to be a revision in the boroughs not Parliamentary, why should there not be one in the Parliamentary boroughs? The words used in the statute are the same with respect to both classes

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of boroughs, and it is clear that incapacity to vote with respect to one class, was intended to be an exclusion with respect to the other. The Respondent therefore was not entitled to vote in the municipal elections, and consequently was not capable of being elected a town-councillor.

Mr. *Hill* and Mr. *Austin* for the Respondent:—The title of the Respondent has been pronounced by the highest Court in Scotland to be sufficient, and it is questioned by a person who has no claim whatever to succeed him in his office; under such circumstances this appeal is not entitled to favourable consideration. But for the appeal from the decision of the sheriff, the Respondent had an unquestionable title to be on the Parliamentary list. The determination on that appeal came too late to affect his vote. The town-clerk is not directed to expunge the name of a person against whom the court of appeal has decided, but it is contended on the other side that he is impliedly bound to do so, because the name of a voter found to be disqualified would be struck out of the Parliamentary lists. If the town-clerk did any thing of the sort without having express authority to do it, he would subject himself to a penalty. The practice of the Court of Queen's Bench is no authority for the argument here. That Court decides matters of this sort when they arise upon a *quo warranto*, and the question always turns upon the fact of the defendant's qualification. No comparison can be instituted between a proceeding of this sort in the Scotch Courts and the proceeding by *quo warranto* in this country. The House cannot decide on any isolated passage of either of the statutes, but all the clauses relating to this subject must be read together. If

that is done, it will plainly appear that the course to be pursued is this, that the town-clerk is to take the Parliamentary list of one year and make up the borough list from it, and then his duty ceases for that year, and he has no power whatever to alter the borough list so made up until the following year, when he must again take the Parliamentary lists, and again make up the borough lists from them. Between the two periods he has no right whatever to touch the borough lists. In no case is he made the judge of the sufficiency of a claim ; he must take the Parliamentary list as settled by the sheriff for his guide, and must implicitly follow it. To adopt a different construction of the Act would be to give him a sort of appellate jurisdiction after the exercise of the authority of the sheriff. This never was intended. He is a mere ministerial officer. In the present case, it is clear that the Respondent was fully qualified when the borough list was made up, and nothing which afterwards occurred with respect to the Parliamentary list could alter his qualification to vote for the borough. Being qualified to elect, he was qualified to be elected, and the decision of the Court below on that point must therefore be affirmed.

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Dr. *Lushington* in reply :—The object of the Legislature was, that the two lists should agree together, and it was the duty of the clerk, on having an intimation of the alteration of the Parliamentary list, to alter the borough list in conformity with the decision of the court of appeal. And at all events, after the name of the Respondent had by the Court of Review been struck out of the Parliamentary list, he in substance had lost his qualification, and could not lawfully elect or be elected.

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The *Lord Chancellor* :—My Lords, I am anxious to draw your Lordships' attention to this case, or at least to one of the appeals in this case, because as it involves the question in certain cases of the right of election in the burghs in Scotland, and as those elections must take place before the next session of Parliament, it might be very inconvenient that the question which has been discussed at your Lordships' bar should remain undecided till the following session.

My Lords, the case arises upon the election in *Glasgow* of Mr. *M'Gavin*, who was upon the Parliamentary list of electors on the 16th of *September*. But between the 16th of *September* and the time of the election of the burgh officers, his name had been erased from the Parliamentary list by virtue of a decision on an appeal which is provided for by the Reform Act for Scotland. When the election of burgh officers took place, the objections were made that he was no longer qualified to be elected, inasmuch as his name had at the time been struck off the Parliamentary list of electors. The election, however, proceeded and he had a majority of votes. After the act of election, but before he was completed in his office by taking the oaths, a bill of suspension and interdict was presented to the Court of Session for the purpose of preventing the completion of his election, and for the purpose of preventing him from acting as such town-councillor. The Lord Ordinary very properly refused to interfere by interdict, seeing the consequences to which that might lead. In consequence of that interdict being refused, Mr. *M'Gavin* was completed in his office.

My Lords, when the case came before the Court of Session, two questions were raised: the first as to

competency ; namely, whether the Court of Session was competent to entertain a suit of suspension and interdict under the circumstances of the case. And if the Court should be of opinion that it was competent, then, whether, according to the facts, the Court was bound to presume, for the purpose of decision, in that stage of the suit, that the case was such as to entitle the pursuer to the decree which he prayed. The Court of Session was of opinion that it was competent to entertain the suit, but upon the merits the Judges were of opinion that they ought to decide against the pursuer.

My Lords, against that latter decision the first of these appeals was presented, namely, upon the merits. The Respondent in the case then presented his appeal, namely, an appeal against the decision of the Court of Session, deciding that it was competent to entertain the suit. That second appeal was presented provisionally only, inasmuch as it would become necessary for Mr. *M'Gavin* to resort to that appeal, and to raise that question, in the event of your Lordships being of opinion that the Court of Session was wrong upon the merits ; and then, of course, it would be necessary for him to show, if he could, that the Court of Session was not competent to entertain that suit.

My Lords, the question upon the first of these appeals is the one that presses for decision, inasmuch as it touches the rule by which the elections are to be conducted during the ensuing autumn ; and that question turns entirely upon the construction of two, or perhaps three, Acts, namely, the two Acts regulating the election of municipal officers, and also the Reform Act of Scotland. The real question is this, whether the list of burgh electors, which by the Municipal Act is directed to be made out on the 16th of

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September in every year, is or is not a final and conclusive list by which the burgh elections are to be regulated in the following month of November, or whether the burgh list so made out in the month of September is or is not to be altered, by having transferred to it any correction that may be made in the Parliamentary list of electors between the 15th of September and the 25th of October.

Now, I have only to call your Lordships' attention to some, and not many, of the sections of those two Acts. The Municipal Reform Act 3 & 4 Will. 4, c. 76, enacts, that the electors shall be such only as are qualified "to vote in the election of a Member of Parliament for such burgh by virtue of an Act passed in the second and third year of the reign of His Majesty King William the Fourth, intituled, 'An Act to amend the Representation of the People in Scotland,' and as are duly registered as such voters in the registers by the said recited Act appointed to be kept."

That section has been much relied upon. It has been contended, that the provisions of that section cannot be carried into effect if any person is permitted to vote in the election of municipal officers, who is not qualified to vote in an election for a Member of Parliament. But it is to be observed, that this is only one of the qualifications required, because the section goes on to provide that such person must be duly registered in the register appointed by that Act to be kept: and the real question is, not whether he is *de facto* qualified to vote in the election of Members of Parliament, but whether this section has not provided a test by which alone the inquiry can be decided whether or not he is duly qualified.

Then, my Lords, the fourth section directs that "the town-clerk shall, on or before the 16th of Sep-

tember, make up and complete a list or roll of persons entitled to vote in the election of the common council of such burgh, in manner following; viz. the town-clerk of each burgh which, in virtue of the said recited Act, sends, either severally or in combination with any other burgh or burghs, a member or members to Parliament, shall make up and complete such list, by transferring from the Parliamentary register for such burgh to such list or roll the names of all the voters contained in such register entitled to vote in the election of a Member of Parliament, as are so registered in respect of properties situated within the royalty, whether original or extended, of such burgh, without requiring any claim, or admitting any objection against the persons so registered."

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That section contains very specific directions; it fixes a particular day, the importance of which your Lordships will see when I come to refer to the Parliamentary Reform Act. It fixes the 16th of *September* as the day on which the town-clerk is bound to look at the Parliamentary register, of course as it exists on that day, and his sole duty is to transfer from that Parliamentary list into his burgh list the names of all such persons who, on the face of that Parliamentary list, are entitled to vote in the election for Members of Parliament. And it is expressly provided that he shall exercise no discretion, that he shall not consider any claim, nor look to any objection, but confine his duty to merely transferring from the one list to the other the names of the persons found on that day upon the Parliamentary list.

Now what does the fifth section provide? Having directed that the town-clerk is to make up his list on the 16th of *September*, the next section provides what he shall do with the list so made up. Each town-clerk

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shall keep his list in the town-clerk's office. Now it is said on the side of the Appellant in the first appeal, that he is to correct his list from time to time, to vary and alter it according to the alterations in the Parliamentary list. This section, after directing him to keep the list, says, that he shall annually correct and complete his list on or before the 16th of *September*. How is he to do this? He is to do it annually on or before a particular day in each year, and he is to do it by removing therefrom "the names of such as may have died, and adding the names of those who may have been inserted in the register appointed by the said recited Act," which is the Reform Act, "since it was made up in the previous year." Then he is, on the 16th of *September* in each year, to take the list which he had completed on the 16th of *September* in the previous year, and to correct it, by omitting the names of those who are dead, and by making such alterations as may have been made in the Parliamentary list since it was made up in the preceding year; a provision which appears utterly inconsistent with that which is contended for on the part of the Appellant, namely, that he is not to do this for the purpose of completing his list on the 16th of *September* in every year, but to do it from time to time as alterations may be made in the Parliamentary list.

Then the eighth section provides, "that upon the first Tuesday in *November*, the electors qualified and entered in the list or roll made up as aforesaid, shall elect from and among the persons contained in the list or roll of the whole electors for such burgh by open poll," and it shall not be competent at such poll to inquire into any other facts than the identity of the party tendering a vote, and if the person mentioned in the list or roll is still holding the qualifica-

tion there mentioned, and his not having previously voted at the same election.

Now the elections are, by the express terms of that section, to take place according to the list made up as aforesaid, and looking at the previous sections in the Act, there is not a list made up as aforesaid except the list made up on the 16th of *September* in each year, by transferring from the Parliamentary register to the burgh list the names of those qualified to vote for Members of Parliament. Now it appears to me to be clear, in the first place, that this list is to be made up from the then existing Parliamentary list, that there is no power in the town-clerk to make any alteration except when he comes to make out the list for the succeeding year, and that the alterations in the Parliamentary list between the 16th of *September* in one year and the 16th of *September* in the following year are not to be regarded till the time for making up the list for the following year, and that the elections to take place in *November* are to proceed upon the list so made upon the 16th of *September*.

My Lords, if that be so, it only remains to be inquired (and that is to be ascertained by looking into the Reform Act) what was the list that did exist on that day, namely, the 16th of *September*, when the town-clerk was directed to transfer from the Parliamentary list to the burgh list the names of persons entitled to vote. The Act provides that, for the purpose of making out the Parliamentary list (I am at present confining myself to those Parliamentary burghs), all the claims and objections shall be laid before the sheriff on the 12th of *August*, who is to decide upon the same on or before the 15th day of *September*, the day immediately preceding the day on which the town-clerk is directed to go and see

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what names are to be found upon the Parliamentary list; that then he shall correct any errors or omissions that may be pointed out, that he shall have this register finally corrected and completed on or before the 15th of *September* in every year, and that after that day no alteration shall be made, but in consequence of the judgment of some court of law.

The 22d section provides, that any party who may complain of the decision of the sheriff may, upon notice, within five days after the judgment of the sheriff, appeal against the same. The 25th section provides, that the court of appeal is to sit between the 15th and 25th of *September*, and to conclude all the cases before the 20th of *October*. Then it provides for the mode in which any alterations made upon the appeal are to be carried into effect, so far as respects the Parliamentary list; that the sheriff, upon judgments of a court of law, they being made known to him by the parties, is to alter and correct the Parliamentary register accordingly. So that all elections are to proceed upon the list as completed before the date of the alteration.

My Lords, from the provisions of this Act, it appears to me clear, that the Parliamentary list from which the burgh list is to be made up on the 16th of *September*, is the list as settled by the sheriff on the 15th of *September*; that any alterations in the Parliamentary list afterwards made are to be inserted in the burgh list of the next year, but are not in the intermediate time to affect the burgh list as made up on the 16th of *September*, and that the elections in *November* are to proceed upon that list.

It was urged in argument, that although there is no express provision in the Act for making those corrections in the burgh list, it must necessarily be

inferred that the Legislature so intended, because it has in another case provided for appeals, by which the burgh list may be corrected, namely, in burghs which are not Parliamentary. It does appear to me, that that affords the strongest possible argument the other way, because when Parliament provides for a particular mode of proceeding in one particular case, and makes no such provision in another case, it must be assumed that that is not mere negligence or inattention in the framers of the Act, but that there is some ground for the distinction between the two cases.

Now does not a distinction exist between the two cases? In the burghs not parliamentary there is no parliamentary list to resort to; the burgh list is, therefore, to be made in the first instance by the officers of the town; and inasmuch as it may be incorrect, the parties are entitled to a more solemn adjudication upon their rights, and therefore from the first list so made there is an appeal given. But in Parliamentary burghs you have to refer to the Parliamentary list, which has gone through all the operations which the lists for burghs not parliamentary have under the Act to go through; namely, the statement of the claims brought in, the investigation of those claims by the sheriff, and the final settlement and correction of that list on or before the 15th of *September* in each year. It is therefore putting the claims in the two cases identically upon the same footing in point of principle, though not the same in point of form. In both cases an appeal is given. In the first set of cases, namely, in Parliamentary burghs, the list passes under the review of the sheriff, from whose decision there is an appeal to a court of law. In the cases of burghs not Parliamentary, it goes through another mode of appeal. In both cases the list upon which

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the elections are to take place is a list that has been through the operation not only of the original formation of it, but also of subsequent appeal.

My Lords, a question was raised upon a matter, which, in the view I take of the case, if your Lordships should concur in that view, it will not be necessary to consider ; namely, that although there is no power given to the town-clerk to correct this list, it was competent to the Court of Session to order it. If I am right in the construction of this Act, it is immaterial to consider that question, because I am clearly of opinion that the election took place according to the right list ; and if the Court of Session had the power of investigating the validity of the claims of the electors, and consequently the qualification of those to be elected, the Court of Session must have come to the same conclusion, and it is immaterial, therefore, to consider whether the Court of Session has or has not the power of correcting any error that appears upon the list, inasmuch as, according to the construction I put upon this Act, there is no error in the list requiring to be corrected.

My Lords, that being the view I take of the original appeal, it will be sufficient, if your Lordships concur in the view I take, to dispose of all that portion of these two appeals which are at all pressing in point of time ; and I apprehend it will not be necessary for your Lordships to come to any conclusion as to the provisional appeal ; namely, the appeal presented by Mr. *M'Gavin*. It was presented only in contemplation of the possibility of your Lordships delivering an opinion contrary to that of the majority of the Judges of the Court of Session, who are in favour of that which appears to me to be the true construction of these several Acts. No question as between

the parties depends upon the second appeal, if your Lordships concur in the view I now take of the first. Nor is there any question in point of costs, because looking at what took place below, and looking at the difficulty of part of the case, I think that whether your Lordships affirm or reverse the judgment of the Court of Session below, it is not a case in which your Lordships would be justified in giving costs on either side.

I am desirous therefore of avoiding saying much upon the subject of that second appeal, but I think it right to say this much, that if there be a difficulty upon the question of competency, it is a difficulty which I cannot but think your Lordships are not very likely to solve. Because, even if such a suit be competent, it is not easy to conceive a case in which the Court could exercise a sound discretion in acting upon that power, either by interdicting an election which is actually in progress, or by interdicting the party elected from exercising the duties of his office in a proceeding in which the Court has not the power of declaring the office void, and therefore enabling the parties to proceed to a new election. It is not a proceeding in which the Court of Session can do that. The extent of the power of the Court of Session would be to prevent one man performing the duties of the office without having the means of putting another person in his place. The Lord Ordinary felt the danger which might arise in such a case from his interfering by interdict, and with great judgment and propriety, although the competency of the suit was maintained, he refrained from exercising the power of the Court by interfering by interdict.

My Lords, there certainly appears to have been a material error in an assumption made in the discus-

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sion of this matter in the Court of Session, namely, that in this country any such power exists in the way of interdicting or preventing the election of officers before the election takes place. Ample power exists for the purpose of correcting an erroneous election, but for the purpose of interfering before the election takes place, there is no power exercised by the Court of King's Bench in this country. If the Judges of the Court of Session, in coming to a decision upon the question of competency, were at all influenced by the supposition that such jurisdiction is exercised in this country, it may be right that they should reconsider that view of the case should any other question of this sort come before them. They are the best judges in the first instance, of how far their courts are competent to decide upon that point. But if they at all came to that decision upon any supposed analogy between the jurisdiction they may be called upon to exercise and a jurisdiction of that kind supposed to exist in this country, it is proper that they should inform themselves accurately upon that subject before they act upon any such supposed analogy. I am satisfied that they will take an opportunity of doing so if the case should again occur.

The Court of Session has as ample power as the Court of King's Bench has in this country, of investigating the legality of elections of this description, and setting those aside which may have been made contrary to law; a more wholesome mode of proceeding, undoubtedly, as the Judges of that Court will probably feel, than by proceeding before the election is completed to prevent its taking place, the consequence of which may be that the town may be left entirely without its municipal officers during a suit which may, and probably will, last longer than the

period for which those municipal officers were to be elected.

My Lords, I do not go further in that cross-appeal; it is not at all material to the interest of the parties that your Lordships should give any opinion upon that mere speculative question, how far that competency may or may not exist in a case where it becomes perfectly immaterial in consequence of a decision against the pursuer upon the merits; but if it should come to be a material question, it would require, in my view of the case, very serious consideration. At present, therefore, I shall move your Lordships to affirm the interlocutor which is the subject of the first appeal. Of course there being a majority of the Judges one way, and one Judge the other, it is not a case in which your Lordships would think it right to give any costs.

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Interlocutor affirmed, without costs.

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April 22. 28.
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Dec. 12.

A P P E A L

FROM THE COURT OF CHANCERY.

JAMES COLVIN - - - - - *Appellant.*

GEORGE HARTWELL, JOHN INNES, and }
SAMUEL BRASIER - - - - - } *Respondents.*

*Trust Fund.
Assignment.
Mutual Debts.
Practice.*

A testator in Calcutta gave 50,000 *l. English* stock to his sons, *J. C. B.* and *M.*, and the survivors and survivor, &c. in trust, during ten years next ensuing his death, to pay the dividends equally among them, with benefit of survivorship in case of the death of any of them within that time without leaving lawful male issue, and if any of them should die leaving such issue, then in trust as to the share or shares of him or them so dying to the use of such issue ; and after the expiration of the ten years, in trust to transfer the capital stock equally among them, with like benefit of survivorship, but the share or shares of such of them as should die within the ten years leaving lawful male issue to be paid to such issue or the issue of such issue on attaining 21, &c. And the testator appointed his said sons his executors. They carried on business in Calcutta as merchants in co-partnership under the style of *J. S. & Co.* ; they sent a copy of the will to *F. & Co.*, their commercial agents in *London*, with a power to receive the dividends on the stock, to be put to their credit in an account distinct from their commercial accounts. One of the agents obtained administration, with the will annexed, received the dividends for ten years, and put them to the account of “ *S. and Brothers*” with “ *F. & Co.*” *M.* and *J.* died within the ten years, *J.* leaving lawful male issue, and a will by which he appointed executors. *C.* and *B.* continued to carry on business under the firm of *J. S. & Co.*, and being largely indebted, assigned all their joint and separate personal estate and effects to trustees for their creditors, and executed a power of attorney to enable the trustees to possess themselves of their interest in the stock ; and notice of the assignment and power was given to *F. & Co.* *C.* then died, within the ten years, leaving lawful male issue.

Held by the Lords (reversing the decree of the V. C. and L. C.), that all the interest of *C.* and *B.* in the stock passed by the assignment, and that *F. & Co.* had no right to any part of the stock, or to retain the dividends that they received after they got notice of the assignment towards the discharge of a debt due to them in their com-

mercial dealings with *J. S. & Co.*, there being no contract to that effect between them.

It is competent to one of several plaintiffs to appeal against a decree ; *Semble.*

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SARKIES TER JOHANNES, an *Armenian* merchant residing at *Calcutta*, in the province of *Bengal*, where he had acquired considerable personal estate, consisting, among other property, of the sum of 50,000 *l.* Three per cent. Consolidated Bank Annuities, standing in his name in the books of the Governor and Company of the Bank of *England*, by his will, dated the 25th of *February* 1812, gave and bequeathed all that his 50,000 *l.* Three per cent. Consols, and all his stock or interest in the Government funds of the United States of *America*, estimated to amount to the sum of 140,000 dollars, and also all his stock in Royal Obligations, in the *Danish* and *Norwegian* Specie Bank of *Copenhagen*, in *Denmark*, amounting to the sum of rix dollars 52,000 *Danish* currency, and all interest, dividends, and proceeds thereof, to accrue due or become payable on the said several capital stocks or funds, and every part thereof, and all benefit and advantage to arise or accrue therefrom, unto his sons *Johannes Sarkies*, *Carrapiet Sarkies*, *Bectan Sarkies*, and *Marterose Sarkies*, and the survivors or survivor of them, and the executors, administrators, or assigns of such survivor, Upon trust, that they should from time to time, as the interest, dividends, or proceeds should become payable and be received, for and during and until the expiration of ten years next ensuing the day of his death, pay, lay out, and apply such interest, dividends, or proceeds unto and amongst his said sons, in equal shares to be divided ; And in case of the death of any of them within the said period of ten years, leaving male

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issue, lawfully begotten, him or them surviving, then in trust, as to the share or shares of the accruing interest, dividends, and proceeds of the said stock and funds, as such son or sons, if living, would have been entitled to, unto and for the use of such male issue of such of his said sons as should have died as aforesaid; And in case of the death of any of his said sons during the said period of ten years next ensuing the day of the testator's decease, without leaving male issue, then that the share or shares of such of his said sons, as should so die, of and in the said interest, dividends, and proceeds should be paid to the survivors or survivor of them, and the male issue of such son or sons as should have so died, leaving male issue: And from and immediately after the expiration of the said period of ten years, in trust to pay, transfer, and assign all such capital stock, or Government funds of *England, America, and Denmark*, as the same should then stand, unto his said four sons, and the survivors or survivor of them, in case of the death of any or either of them before the testator, or within the said period of ten years, without leaving male issue of their bodies lawfully begotten, or to be begotten, him or them surviving, equally to be divided, share and share alike; and in case any of his said sons should die previous to the expiration of the said ten years, leaving male issue of their or his bodies or body, lawfully begotten, then in trust as to the share or shares of such of his said sons as should have so died, leaving male issue of their bodies, unto and for the use of all and every such male issue as should live to attain the age of twenty-one years, share and share alike, if more than one, or the survivors or survivor of such of them as should attain that age, and the issue of the bodies or body of such of them as should have died

under that age, leaving issue lawfully begotten, equally to be divided between them on their respectively attaining the age of twenty-one years; and if but one should attain that age, or, dying under that age, have left issue of his body lawfully begotten, the whole to such one only, or the issue of such one as should have died leaving issue, equally to be divided if more than one, and if but one the whole to such one, to be payable and paid to him or them on his or their attaining the age of twenty-one; provided, that in case all such male issue of such of his said sons as should so die, either before him, or within the said period of ten years from his decease, leaving male issue, should die under the said age and without leaving issue of their or his bodies or body lawfully begotten, then in trust as to the share or shares of such of his said sons as should so die leaving such male issue, who should all so die under the said age and without leaving issue lawfully begotten him or them surviving, unto and for the use of the survivors of his said sons, and the male issue of such of them as should be dead leaving male issue of their or his bodies, lawfully begotten, who should attain the said age of twenty-one years, and the issue of such of them as should have died under that age, leaving issue of their or his bodies or body lawfully begotten, equally to be divided, share and share alike, such issue, however, of such male issue of his said sons as should so die under the said age, leaving issue, in no case to take any further or other share than his, her, or their father or fathers would have been entitled to, if he or they had lived to attain the age of twenty-one years. And the testator appointed his wife, *Mariamjohn Sarkies*, and his said four sons, his executrix and executors.

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The testator died on the 16th of *August* 1812, without revoking or altering his said will. The wife and the four sons were all living at his death, but *Johannes Sarkies* and *Carrapiet Sarkies* alone proved the will in *India*.

For some years before the testator's death, and afterwards, his said four sons had carried on business as merchants in copartnership together in *Calcutta*, under the firm of *Johannes Sarkies & Co.* During that time the Respondents, *George Hartwell* and *John Innes*, carried on business in *London*, as merchants and *East India* agents, in partnership with *William Fairlie* and *Henry Bonham*, both since deceased, under the firm of *Fairlie, Bonham & Co.*, and were employed as the agents in *London* of the firm of *Johannes Sarkies & Co.*, and as such agents had various extensive dealings with that firm; and under a power of attorney from the said testator, *Sarkies ter Johannes*, they received from time to time during his lifetime, the dividends on the 50,000 *l.* three per cent. consols, and by his direction carried the amount so received to the credit of the firm of *Johannes Sarkies & Co.*

Upon the testator's death, the four sons wrote a letter to *Fairlie, Bonham & Co.*, dated *Calcutta*, 19th of *August* 1812, in which,—after stating that they, with their mother, were appointed executors of their father's will, and that the property in the *English* funds was, by the will, divided between the four brothers,—they said, “You will therefore have the goodness to continue to receive the interest on our account under the authority of the power of attorney you at present possess.” And on the 21st of *November* 1812, they wrote another letter to the same, enclosing an exemplification of the probate of their father's will, and a power of attorney, authorising the several mem-

bers of the firm of *Fairlie, Bonham & Co.* jointly and severally to receive the dividends then due, and thereafter to become due, on the *English* funds; and in which they said, "We doubt not but you will have received the *January* dividend before our above letter of 19th of *August* could have reached; and we therefore request in this case that you will take it from our general account, and bring it to our credit in another separate account under our different names; and such other dividends, as you may in future receive, you will also bring into this new account, as it is our particular wish that this should be kept quite distinct from our other concerns. On account of the above dividends we valued on you, on the 20th instant, No. 25, for 2,000 *l.*, in favour of Messrs. *Fairlie, Ferguson & Co.*, at six months, which we request may be honoured and debited in our said new account: and as we calculate on this bill falling due about *October* next, so short a time before the dividend of *January* 1814 will be receivable, we depend on its being honoured, as from *January* 1813 to 1814 three dividends will have been received, and on which account we have drawn the above bill. We have drawn the bill under our old firm, *Johannes Sarkies & Co.*, which will be immaterial, as we are the only members of that firm."

Upon receipt of these letters and power of attorney, *Fairlie, Bonham & Co.* accepted the bill for 2,000 *l.* and applied for the dividends on the 50,000 *l.* three per cent. consols, but the Bank refused to pay them to any one but the legal personal representative of the testator in this country, or to some person authorised by such representative; whereupon the Respondent *G. Hartwell*, as partner in the firm of *Fairlie, Bonham & Co.*, on behalf of that firm, and as one of the

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attorneys named in the power, obtained letters of administration, with the will of the testator or a copy thereof annexed, out of the Prerogative Court of Canterbury, and under such letters of administration he continued to receive the dividends on the 50,000 *l.*, and he carried them from time to time as received to the credit of *Johannes Sarkies & Co.*, in account with *Fairlie, Bonham & Co.*; and they informed the testator's said sons by letter, dated 29th of *July* 1813, that they had taken out such administration.

Marterose Sarkies, one of the testator's four sons, died on the 15th of *April* 1814, without leaving any male issue of his body surviving; *Johannes Sarkies*, another of them, died on the 28th of *December* 1816, leaving three sons, *Sarkies Johannes Sarkies*, *Petruse Johannes Sarkies*, and *Calchick Johannes Sarkies*, the only issue male of his body surviving, and having by his will, duly made and published, appointed *Aviet Agabeg*, *Alexander Colvin* the elder, *Alexander Colvin* the younger, and *James Colvin*, his executors and guardians of his children. The will was proved in *England* by *Aviet Agabeg* alone. On the 1st of *December* 1819 *Carrapiet Sarkies*, another of the four sons, died, leaving two sons, *Johannes Carrapiet Sarkies* and *Morat Carrapiet Sarkies*, the only issue male of his body surviving him.

The business continued to be carried on under the firm of *Johannes Sarkies & Co.*, notwithstanding the deaths of some of the sons, and up to the year 1817 *Fairlie, Bonham & Co.* continued to act as their agents in *London*, having, besides the accounts in respect of the dividends on the 50,000 *l.* consols, various other transactions and accounts with the firm, under the titles "separate account," "account con-

signments *per Harriet*," "account consignments *per Ocean* and *Devaynes*," &c. In consequence of the direction in the letter of the 21st of *November* 1812, the dividends on the 50,000*l.* consols received in the years 1813, 1814, 1815, and 1816 were carried to a separate account, under the name of *Sarkies, Brothers*.

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In *March* 1817 *Carrapiet Sarkies* and *Bectan Sarkies*, then the surviving partners of the firm, being largely indebted to several persons in *India* and in *England*, entered into a composition with their creditors, and for their benefit executed a deed of assignment of all their joint and separate property and effects unto *Alexander Colvin*, since deceased, *Henry Mathew*, and the said *Aviet Agabeg*, (therein described as creditors, and also trustees, named and appointed on behalf of themselves and other creditors of said *Carrapiet* and *Bectan*), their executors, administrators, and assigns, (with the usual powers for suing for and recovering the same,) upon trust, to collect, get in, and convert the said property and effects into money, and after paying the costs of executing the trusts, to apply the residue in payment of the several debts due by the said *Carrapiet* and *Bectan*, or either of them, to such of their creditors as should execute the said indenture, rateably and without any priority, until each of the creditors, or his executors, administrators, or assigns should have received the full amount of their respective demands; and after payment in full of all such demands, then upon trust, to pay the residue unto the said *Carrapiet Sarkies* and *Bectan Sarkies*, their executors, administrators, and assigns. And to enable the said trustees to possess themselves of the interest of the said *Carrapiet* and *Bectan*, in the 50,000*l.* consols,

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they as surviving executors of the said testator, by desire of said trustees, executed a power of attorney, dated the 30th of *April* 1817—revoking all former powers given by them to any person resident in *Great Britain*—to *Richard Campbell Bazett, David Colvin, John Farquhar, William Crawford, and James Gathorne Remington, of London, East India* agents, jointly and severally to obtain probate in *England* of the will of the said testator, and administration of his estate and effects unadministered, and to obtain a revocation of all other letters of administration of the said estate, and to collect and get in the same, with all proper powers in that behalf.

Aviet Agabeg and his co-trustees caused notice of the said assignment and power of attorney to be given to Mr. *Hartwell* and his partners in the firm of *Fairlie, Bonham, & Co.*, and requested them to pay to Messrs. *Bazett, Farquhar & Co.*, as their agents, what should be due to them as such trustees in respect of the shares and interest of *Carrapiet Sarkies* and *Bectan Sarkies* in the said stock. But Messrs. *Fairlie, Bonham & Co.* claimed to be entitled to the dividends of the said stock in satisfaction of a large debt due to them from the firm of *Johannes Sarkies & Co.*, in respect of advances made by them to that firm on the faith of the dividends.

In 1822, *Aviet Agabeg*, as executor of *Johannes Sarkies*, and the three infant children of *Johannes Sarkies*, by the said *A. Agabeg*, as their next friend, filed a bill in the Court of Chancery, (which bill was afterwards amended, by stating the said *A. Agabeg* as creditor and trustee under said assignment), against *G. Hartwell* and the other members of the firm of *Fairlie, Bonham & Co.*, making the two infant sons of *Carrapiet Sarkies*, and also *Bectan Sarkies*, who

were out of the jurisdiction, and the said *Henry Mathew*, parties defendants. The amended bill, after stating partly to the effect hereinbefore stated, and that *Alexander Colvin* had died in 1818, and that *Henry Mathew* had since returned from *India* to *England*, and that several of the creditors of *Carrapiet* and *Bectan Sarkies*, entitled to the benefit of the indenture of assignment, were residing out of the jurisdiction, further stated, that under the circumstances aforesaid and in the events which had happened, the plaintiffs *Sarkies Johannes Sarkies*, *Petruse Johannes Sarkies*, and *Calchick Johannes Sarkies*, as the only sons and issue male of the said *Johannes Sarkies*, deceased, and the said defendants *Johannes Carrapiet Sarkies* and *Morat Carrapiet Sarkies*, as the sons and only male issue of the said *Carrapiet Sarkies*, deceased, would be entitled *per stirpes*, when and as they should respectively have attained their ages of twenty one years, to two-thirds of the said 50,000 *l.* three per cent. consols, and of the said *American* and *Danish* stocks, with the dividends thereon from the deaths of the said *Johannes Sarkies* and *Carrapiet Sarkies* respectively during their respective minorities, and such contingent interests and benefit of survivorship as in the said bill mentioned, in the event of the said *Bectan Sarkies* dying within the said period of ten years without leaving male issue, or any of the said plaintiffs or the infant defendants dying under the age of twenty-one years without leaving male issue entitled under the said will; and that they were entitled in the meantime to have the said fund secured for their benefit; and that the plaintiff *Aviet Agabeg* was entitled, as the executor and personal representative of the said *Johannes Sarkies*, to have so much of the dividends of the said stock as he had become entitled to in his lifetime, and had not received,

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paid to him ; and that he the said plaintiff and *Henry Mathew*, as surviving trustees, were entitled, by virtue of the said assignment, to the said *Bectan Sarkies'* contingent interest in the said funds, and to the dividends thereof during his lifetime, and also to the interest and dividends which accrued due in respect of the said *Carrapiet Sarkies'* share of the said funds and securities from and after the date of the said indenture of assignment and before his death ; and the bill further stated, that the trusts of the said indenture then remained unexecuted, and that the personal estate and effects thereby assigned were not sufficient for the payment of the creditors of the said *Carrapiet* and *Bectan Sarkies*, who were entitled to be paid the amount of their debts thereunder, and that the whole of the said *Bectan* and *Carrapiet Sarkies'* interest in the said legacies would be wanting for the purpose aforesaid.

The bill charged that the defendants, *G. Hartwell* and his partners, received the said dividends and personal estate, with notice of the trusts affecting the same, and that they were not entitled to retain the same against the plaintiffs ; and further charged, that even if the defendants had advanced "*Johannes Sarkies & Co.*" any sums of money, and if "*Johannes Sarkies & Co.*" were indebted to the defendants for the amount thereof, the defendants had not any lien whatsoever on *Bectan Sarkies'* share in the said legacies, nor on the dividends which accrued due on the stocks, to *Johannes Sarkies* and *Carrapiet Sarkies* in their respective lifetime, and that in particular the said defendants had not any lien on any part of the said funds, or the dividends or interest thereof, which had been received by them since the date of the said assignment, or since they received notice thereof from the plaintiff *Aviet Agabeg* and his co-trustees.

The bill prayed that the rights and interest of the plaintiffs and of defendants in the said trust funds and securities might be ascertained and declared by the decree of the Court, and that the defendant *G. Hartwell* might account for the 50,000 *l.* three per cent. consols, and the dividends which had accrued due thereon since the death of the said testator, and which had been received by him; and that the defendants *W. Fairlie, H. Bonham, J. Innes, G. Hartwell, and S. Brasier*, might also be decreed to come to account for the dividends and interest of the said *English, Danish, and American* stocks, which had been possessed by them, and that what should be found due to the estate of the testator *Johannes Sarkies* might be paid to *A. Agabeg*, as his executor, and what should be found due to the three infant plaintiffs in respect of the said dividends since the death of their father might be properly applied for their benefit; and that it might be declared that *A. Agabeg* and *H. Mathew*, as surviving trustees in the indenture of assignment, were entitled thereunder to *Bectan Sarkies'* vested and contingent interest in the said funds, and to the dividends on his share thereof since the date of the assignment, and that they were also entitled to *Carrapiet Sarkies'* interest in the dividends which became due and had not been received by him in his lifetime, and that the said dividends might be accounted for and paid to *A. Agabeg* and the said other plaintiffs; and that the respective shares and interests of the said plaintiffs and the two infant defendants in the said funds might be paid to them when and as they should respectively become entitled thereto, and that in the meantime the 50,000 *l.* three per cent. consols might be transferred into the name of the Accountant-general, in trust in this cause,

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and be secured for the benefit of plaintiffs and other parties entitled thereto.

All the defendants, except *Bectan Sarkies*, and the infant defendants, who were resident at *Calcutta*, put in their answers; *G. Hartwell*, by his answer, first to the original will, admitted that, in *July* 1813, letters of administration of the personal estate of the testator *Sarkies ter Johannes* were granted to him as the agent of the testator's executors; but denied that he possessed himself of any part of the estate save the dividends on the 50,000 *l.* three per *cent.* consols, which accrued due since his death, and which this defendant received up to and including the dividend due the 5th of *July* 1822. And defendant further said, that at and for some time before and since the time of the death of testator, he (defendant) carried on business in *London*, in partnership with *W. Fairlie*, *H. Bonham*, and *J. Innes*, under the style of *Fairlie, Bonham & Co.*, in which *S. Brasier* became a partner; and that the said four sons of the testator, for some time previously as well as subsequently to his death, carried on business as merchants in *Calcutta*, in partnership together, under the style of "*Johannes Sarkies & Co.*," and *Fairlie, Bonham & Co.* had divers dealings with the firm of *Johannes Sarkies & Co.*; and defendant and his partners, for some time previously to the death of testator, received the dividends on the 50,000 *l.* three per *cent.* consols by virtue of a letter of attorney executed by the testator, and by his directions placed the same to the credit of *Johannes Sarkies & Co.*; and that after testator's death, his said four sons sent to defendant and his partners a copy of the said will, and also a power of attorney, authorising them to receive the dividends then due and to accrue due on the said

50,000 *l.*; but the Bank of *England* declining to pay the dividends to any person not being, or not being authorised by, the legal personal representative of the testator in this country, defendant, under the said power of attorney, procured letters of administration, &c., and by virtue thereof received the dividends since the death of testator, and placed them, by the direction and consent of the four sons, and the survivor of them carrying on business under the said firm of *Johannes Sarkies & Co.*, to the credit of *Johannes Sarkies & Co.*, and at the time of the decease of *Marterose Sarkies*, in *April* 1814, the firm of *Johannes Sarkies & Co.* was largely indebted to the firm of *Fairlie, Bonham & Co.*, on the balance of accounts, after giving credit for all the said dividends up to that time, and that the greatest part of such sum was still owing to *Fairlie, Bonham & Co.*; and from the death of said *Marterose* up to *December* 1816, the three brothers, as surviving partners, continued to carry on business under the said firm, and had divers dealings with *Fairlie, Bonham & Co.*, and on the death of *Johannes Sarkies*, they as such surviving partners, and on the balance of account between them and *Fairlie, Bonham & Co.*, were largely indebted to the last-mentioned firm; the greatest part of which debt was still owing to them, and that *Bectan Sarkies*, as the surviving partner of the said firm, was then justly indebted to defendant and his partners in the sum of 11,000 *l.* and upwards, on the balance of all accounts between them, after giving him credit for all the dividends which had been received by the defendant on the said 50,000 *l.*, and for all other monies received on his account; and defendant said, that he and his partners gave credit to the firm of *Johannes Sarkies & Co.*, upon the faith of the said 50,000 *l.*, and

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of the defendant and his partners being permitted to apply the dividends towards the discharge of what was owing to them; and that such dividends were from time to time so applied by the direction and with the knowledge of all the members who were living of the said firm; and *Bectan* being the sole surviving partner of the said firm, this defendant, on behalf of himself and his partners, claimed to be entitled to all the share, right, and interest of said *Bectan* in the said 50,000*l.*, and to have a lien or claim thereon, and to be entitled to apply the same towards discharge of what was due and owing to the defendant and his partners from the said *Bectan*, as such surviving partner.

On the 16th of *January* 1823, after the said answer was put in, an order was made on Mr. *Hartwell* to transfer the 50,000*l.* consols into the name of the Accountant-general, in trust in the cause, but without prejudice to his and his partners' alleged lien or claim. A motion, which was afterwards made against Mr. *Hartwell* and partners for payment into Court of the dividends received by them on the 50,000*l.*, was refused by the Vice-Chancellor, and also by the Lord Chancellor on appeal.

In *February* 1823 to the amended bill filed by *A. Agabeg*, (as executor of his testator, and also as creditor of *Carrapiet* and *Bectan Sarkies*, on behalf of himself and their other creditors under the assignment,) and by the plaintiffs in the original bill against the Respondents, and *W. Fairlie* and *H. Bonham* and other defendants; the Respondent *G. Hartwell* put in his answer, admitting as in his former answer was admitted, and stating, that in *January* 1817 *S. Brasier* became a partner in the firm of *Fairlie, Bonham & Co.*, but that scarcely any new

transactions in business took place between the said *Carrapiet* and *Bectan Sarkies*, or the survivor of them, and the firm of *Fairlie, Bonham & Co.* subsequently to *January* 1817, the transactions after that period having been little more than a disposition and realisation by *Fairlie, Bonham & Co.* of merchandise then on hand, and payment made by them on account of transactions depending; and he said that he and *W. Fairlie, H. Bonham, and J. Innes* had (by virtue of an authority given by the said four brothers to their agents in *America* to account to the defendant and his partners for the same) received sums of money which were remitted to defendant and his partners from *America*, in the year 1815, to the amount altogether of 4,200*l.*, and which the defendant believed arose from the dividends on the *American* funds; and that the same when so received were carried by *Fairlie, Bonham & Co.* to the account of *Johannes Sarkies & Co.*, in like manner and by the like direction as the dividends on the 50,000*l.* And he received the dividends on the 50,000*l.* by virtue of letters of administration as aforesaid, and by direction and consent of the said four brothers, and the survivors of them who were the executors in *India* of the testator *Sarkies ter Johannes*, and also legatees of the same dividends under the said will, and the persons from time to time composing the firm of *Johannes Sarkies & Co.*; and that defendant paid such dividends when so received to the house of *Fairlie, Bonham & Co.*, to the credit of *Johannes Sarkies & Co.*, with *Fairlie, Bonham & Co.*, and that the firm of *Johannes Sarkies & Co.*, consisting of such executors and legatees as aforesaid, drew bills of exchange upon *Fairlie, Bonham & Co.* which were duly paid as they became due, and that *Fairlie, Bonham & Co.*

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made various other payments on account and by the authority of *Johannes Sarkies & Co.*, and that the amount of such dividends was thereby paid to the said executors and legatees, and applied and disposed of by the defendant; and he said that some time in *December* 1817, Messrs. *Bazett, Farquhar, Crawford, & Co.*, as agents of the plaintiff *A. Agabeg* and his alleged co-trustees, gave notice to defendant and partners of their having received a copy of the alleged assignment and of the claim set up by them under the same, and made some such requests to the defendant and partners as in the bill mentioned; and he said that he received the interest and dividends of the 50,000*l.*, with notice that the same had belonged to or arisen from the estate of the testator *Sarkies ter Johannes*, and with notice of the trusts created by the will of the said testator, and that such parts of the said interest as were received after the month of *December* 1817, but no other, were received with notice of the said alleged assignment by *Carrapiet* and *Bectan Sarkies*.

The defendants *W. Fairlie, H. Bonham, J. Innes*, and *S. Brasier*, put in their answer to the same effect as the aforesaid answer of *G. Hartwell*, and the cause being at issue, witnesses were examined on the part of the plaintiffs, and certain admissions were made by them, the substance and effect of which are already partly stated. It further appeared from letters and other documents that were admitted without proof, that the firm of *Johannes Sarkies & Co.* was accustomed to make consignments of merchandise to *Fairlie, Bonham & Co.* for sale, and to draw bills upon them upon the credit of such consignments, and that for convenience distinct accounts were kept of such consignments and the bills drawn in respect of them, until the consignments had been sold and

the produce of the sales realised and the bills paid, when the particular account was closed, and the balance became an item in the general account of the house of *Johannes Sarkies & Co.* It also appeared from the correspondence between the parties, that when their letters related to their mercantile affairs, they were signed or addressed, as the case might be, "*Johannes Sarkies & Co.*," but when the letters related to the funds in question, each brother signed the same as in his individual character, and relating to his separate concerns; and in like manner, *Fairlie, Bonham & Co.* addressed their letters upon such subjects to the said several persons individually. *Fairlie, Bonham & Co.*, on the 27th *May* 1813, wrote to the said four sons in reply to their letters (a), "We shall do the needful with the power of attorney and the exemplification of the will which accompanied your favour of the 21st *November*, and we have honoured your draft for 2,000*l.*, which will be carried to the debit of a separate account, to which we shall credit the dividends from the stock agreeably to your desire, and which shall now be transferred into your names;" and on the 29th of *July* 1813, they wrote another letter to the said four sons of testator, wherein, after referring to the above letter, they said, "We are now sorry to inform you, that on producing the documents at the Bank, we found that we could not be allowed to act upon them before an administration was taken out in this country. This we have accordingly done, and we have received the Midsummer dividend, but this formality has subjected you to a charge of 299*l.* 2*s.*" The said four sons of testator having,

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in a letter to *Fairlie, Bonham & Co.*, dated the 14th *November* 1813, with reference to their letter of the 27th of *May*, and the transfer to be made of the bank annuities into their names, requested *Fairlie, Bonham & Co.* to send to them a notarial certificate that the said funds were standing in their names, Messrs. *Fairlie, Bonham & Co.*, in answer, wrote on the 4th of *June* 1814, "This transfer has not yet been made, we having been informed that the Directors of the Bank would not admit of it until the expiration of the ten years mentioned in your father's will; but on our now renewing our application for this purpose, we find they will permit us to transfer the whole into your four names jointly, but not to divide it into shares; the former we shall do as soon as the stock opens, and transmit you notarial certificates thereof, and powers of attorney for you to sign to enable us to receive the dividends in future." In another letter, dated 10th *February* 1816, after the death of *Marterose Sarkies*, the surviving brothers having sent to *Fairlie, Bonham & Co.* some documents by which it would be seen that he was dead without issue, Messrs. *Fairlie, Bonham & Co.* wrote, "We have exhibited these documents at the Bank of *England*, where they have been registered, and your names inscribed as trustees under your late father's will for the transferring of your stock in equal shares to each of you upon the expiration of ten years after the day of his death, agreeably to his determination. There is therefore ample time to prepare the certificate of the date of that event, and the arrangements which you may then have determined upon. In the meantime we will continue to receive the dividends on the stock as before, to be at your disposal." It was also admitted

by the plaintiff, that a large sum was due to the firm of *Fairlie, Bonham & Co.* from the firm of *Johannes Sarkies & Co.*

By the decree made by the Vice-Chancellor on the hearing of the cause, the 4th of *July* 1831, it was ordered that it should be referred to the Master to inquire and state to the Court when *Sarkies ter Johannes*, the testator, and his sons *Johannes Sarkies*, *Carrapiet Sarkies*, and *Marterose Sarkies* respectively died : and to inquire and state whether the testator's sons, *Johannes Sarkies*, *Carrapiet Sarkies*, and *Marterose Sarkies*, or any and which of them, at the time of their respective decease, left any and what male issue lawfully begotten : and to inquire and state the ages of such male issue, and whether any of such issue had since died, and if so, whether after having attained the age of twenty-one years ; in which case the Master was to inquire and state who were their personal representatives, and if he should find that any or either of them died under the age of twenty-one, then to inquire and state whether any or either of them left any and what issue ; and the Master was to state the names and ages of such issue, and whether they were then living or dead, and if dead, who were their legal personal representatives : and it was further ordered that the Master should inquire and state whether the assignment of the 28th of *March* 1817, was ever and when executed, by any and what parties.

The Master made his report, dated the 21st of *May* 1832, which was confirmed by an order dated the 5th day of *July* 1832 ; and he thereby found, by the evidence produced before him, that the testator died on the 16th of *August* 1812, *Johannes Sarkies* died on the 27th of *December* 1816, *Carrapiet Sarkies* died on the 1st of *December* 1819, and *Marterose*

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Sarkies died on the 15th of *April* 1814: and he found that *Johannes Sarkies* left issue three sons, all of whom were living at *Calcutta* in *June* 1829, viz., the plaintiffs, *Sarkies Johannes Sarkies*, *Calchick Johannes Sarkies*, and *Petruse Johannes Sarkies*, and that they were born at the times mentioned in his said report; and he found that *Carrapiet Sarkies*, the second son of testator, left two sons, as alleged before him, but not hitherto proved by evidence, viz., *Johannes Carrapiet Sarkies*, and *Morat Carrapiet Sarkies*, the infant defendants in this suit: and that *Marterose Sarkies*, the youngest son of testator, did not leave any male issue; and as to the execution of the assignment, the Master certified that by the evidence produced to him, he found that the said indenture was duly executed on the 28th of *March* 1817, by *Carrapiet* and *Bectan Sarkies*, and by *Alexander Colvin*, *H. Mathew*, and *A. Agabeg* and others.

The said cause came on to be heard on further directions before the Vice-Chancellor, on the 15th of *February* 1833, and by the decree then made, it was ordered that it should be referred back to the Master, to tax the costs of the defendant, *G. Hartwell*, as administrator of the said testator, relating to the execution of the trusts of the will, or to the said suit, and which were not costs in the cause, and also to tax all parties their costs of the suit; and it was ordered that such costs should be paid as therein mentioned: and his Honor declared that the firm of *Fairlie, Bonham & Co.* were entitled to the dividends of the 50,000 *l.* Bank 3 per cent. annuities which belonged to *Johannes Sarkies*, *Carrapiet Sarkies*, *Bectan Sarkies*, and *Marterose Sarkies*, the sons of the testator, and which were received by *Fairlie, Bonham & Co.*

up to the time of the respective deaths of *Johannes Sarkies* and *Carrapiet Sarkies*, and that *Fairlie, Bonham & Co.* were also entitled to the one-third share of *Bectan Sarkies* in the said 50,000 *l.*, and to the dividends and accumulations of his one-third share towards payment of the debts due to them by the firm of *Sarkies & Co.*: and his Honor further ordered that the Master should take an account of what was due to the defendants, *G. Hartwell, J. Innes*, and *S. Brasier*, as surviving partners of the firm of *Fairlie, Bonham & Co.*, from the defendant, *Bectan Sarkies*, as surviving partner of the firm of *Johannes Sarkies & Co.* in respect of the dealings and transactions between the said firms: and it was further ordered that the Master should also take an account of the dividends in respect of the one-third shares of the male issue of *Johannes Sarkies* and *Carrapiet Sarkies* of the said sum of 50,000 *l.* received by the defendants, *Hartwell, Innes*, and *Brasier*, and by *W. Fairlie* and *H. Bonham*, both deceased, in their lifetimes, since the time of the respective deaths of *Johannes* and *Carrapiet Sarkies*; and the Court declared that the plaintiffs, *Sarkies Johannes Sarkies, Petrus Johannes Sarkies*, and *Calchick Johannes Sarkies*, were entitled to the one-third share of the dividends of the said 50,000 *l.*, which had become due and been received since the death of *Johannes Sarkies*, their father, and were also entitled to a like third part of the capital of the said sum, subject to a deduction of 5,000 *l.* each, and the dividends thereof, which had already been transferred and paid to them or carried over to their respective accounts, pursuant to an order made in this cause, the 6th of *August* 1832: and it was further ordered that the said Master should carry on the inquiry by the decree directed as

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to the male issue lawfully begotten of testator's son, *Carrapiet Sarkies*; and it was further ordered that 1,666 *l.* 13 *s.* 4 *d.* Bank 3 per cent. annuities, part of the 53,986 *l.* 18 *s.* like annuities, standing in the name of the Accountant-general of this Court, in trust in this cause, should be carried over, in trust in this cause, to the account of the plaintiff *Sarkies Johannes Sarkies*; and like sums, parts of the said capital stock, to the respective accounts of the other two infant plaintiffs, *Calchick Johannes Sarkies* and *Petruse Johannes Sarkies*; and it was further ordered that the Master should ascertain the respective one-third shares of the said plaintiffs, and of the male issue lawfully begotten of *Carrapiet Sarkies*, and of the defendant, *Bectan Sarkies*, in the said sum of 50,000 *l.* Bank 3 per cent. annuities, and in the dividends, interest, and accumulations thereof, which had accrued since the same were transferred by the defendant, *G. Hartwell*, in trust in this cause, after payment of costs as aforesaid (*a*).

(*a*) The following note of the Vice-Chancellor's judgment is taken from the shorthand writer's notes, referred to as correct by counsel at the bar.

The *Vice-Chancellor*: — *Sarkies ter Johannes*, the father of these four children who survived him, employed the firm of *Scott & Co.*, (who were succeeded by Messrs. *Fairlie, Bonham & Co.*,) as his agents, and prior to the year 1800, they had, under his direction, purchased 47,000 *l.* three per cent. consols. Then he writes a letter, by which he does in effect notify that he is going to retire from business, and directs that they (*Scott & Co.*) shall make up the sum of 50,000 *l.*, and place to the credit of his son, *Johannes Sarkies*, the annual interest on the 50,000 *l.*, and they were to comply with his directions on that subject. Then it appears that this gentleman died on the 10th August 1812, and that prior to that time the four sons had been carrying on business as a house of trade in *India*, under the name of *Johannes Sarkies & Co.*, with Messrs. *Fairlie, Bonham & Co.*, and that they had accounts with them, which were of this nature: there was one account which appears sometimes to have been called "your account," and sometimes "your general account;" what were the particulars that constituted that account does not appear, but it seems that besides that account there were

Aviet Agabeg appealed to the Lord Chancellor from so much of the decree as declared that the firm of

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accounts carried on under this heading, “Goods per the *Indus*,” “Goods per the *Ocean*,” “Goods per the *Harriett*,” “Goods per the *Lady Lushington*,” and why the accounts were so carried on in that manner between the two houses does not appear; but one is left to conjecture that for the sake of understanding at once the mode in which their respective accounts stood, they were kept in this manner, and that nevertheless, all the accounts together constituted one general dealing, between the house in *India* and the house in *England*.

The father made his will, the effect of which was, to give the 50,000*l.* consols, together with a quantity of *American* stock, and a quantity of *Danish* stock, to his four sons for the term of ten years, with a proviso, that if any son died without issue male, then his share should go to the survivors, but if he died leaving issue male, then his share should go to his issue male. The four sons wrote a letter on the 19th of *August*, and they state that they are appointed executors to the will, with their mother, and they state that the property in the *English*, *Danish* and *American* funds is to be divided between the four; and they say, “You will therefore have the goodness to continue to receive the interest on our accounts under the authority of the power of attorney you at present possess,” which was a power of attorney from their father. It appears the father had appointed his four sons and their mother as executors, and two only of the sons proved the will in *India*, *Johannes* and *Carapiet*. Well, a new power was sent by a letter, dated the 21st *November* 1812, which was a power from the mother and the four sons, and that was a general power to act for them. They say in the letter, “We doubt not you will have received the *January* dividend before our above letter of the 19th of *August* could have reached you, and we therefore request in this case that you will take it from our general account, and bring it to our credit in another separate account under our different names, and such other dividends as you may in future receive, you will also bring into this new account, as it is our particular wish that this should be kept quite distinct from our other concerns.” Then they say, “We have drawn a bill under our old firm of *Johannes Sarkies & Co.*, which will be immaterial, as we are the only members of that firm*.” I understand but for this letter, unless Messrs *Fairlie, Bonham & Co.* had thought proper to do it of their own account, that the dividends received, and the drafts drawn in respect of the dividends, would have formed an item in the general account; but I do not observe in this letter that it directs that there shall be a particular account kept of the dividends; that there is anything like a representation made to *Fairlie, Bonham & Co.*, that if at any time there should be a balance due to them from the house in *India*, the sums

* See a larger extract from that letter, *ante*, p. 489.

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Fairlie, Bonham & Co. were entitled to the dividends of the 50,000 *l.* 3 per cent. consols, which

of money that might be in their hands in respect of the dividends might not be applied in the liquidation of that obligation; but this, as I understand, is a mere direction as to the mode of keeping the accounts in respect of the dividends, and nothing else. Now Messrs. *Fairlie, Bonham & Co.* answer that letter by a letter of the 27th of May; they say, "We shall do the needful with the power of attorney, and the exemplification of the will which accompanied your favour of the 21st of November, and we have honoured your draft for the 2,000 *l.*, which will be carried to the debit of a separate account, to which we shall credit the dividends from the stock, agreeably to your desire, and which shall now be transferred into your names." Well, then, it appears, what was pretty obvious to anybody who understands the law, that none of the dividends could be received, unless there was a personal representative in this country; but inasmuch as the power of attorney was sent in order to enable *Fairlie, Bonham & Co.* to accomplish the general object which the parties had, namely, the receipt of dividends, and that general object could not be effected otherwise than by doing that which the power of attorney, on the face of it, authorised them to do, namely, to procure an administration to one of their house, one of the parties named in the power of attorney takes out administration,—that was Mr. *Hartwell*.

Some letters are written afterwards on the subject, and I do not think it is very material to notice whether some of them, which were written expressly with respect to the dividends, were signed with the names of the four brothers, or the three, or whether, as the fact really was, some of them were only signed with the name of *Johannes Sarkies & Co.* But it appears that the accounts were from time to time transmitted, and according to the directions which were given in the letter, the accounts, that is to say, the general result of the particular accounts, were kept separate, so that at the glance of an eye, the gentlemen in *India* could see how their accounts stood in respect of dividends, as well as how their accounts stood in respect of the general matters of the goods in "the *Lady Lushington*," or the other ships; and it appears that the accounts went on until, in the month of September 1815, Messrs. *Fairlie, Bonham & Co.* send a statement of the accounts, upon which, stating the sum of credit, and setting it against the sum of the debits, it does appear the sum of 15,338 *l.* was due to them, and in respect of that, they say they will draw a bill for 15,000 *l.*, which they hope will be accepted. On the 5th of October 1815, *Sarkies & Co.* write that letter, which requests that *Fairlie & Co.* will have the goodness to pay over to Messrs. *Bazett & Co.* the half-yearly dividends on the 50,000 *l.* stock. *Fairlie & Co.* send—it does not appear when that letter was received—but they send a letter of the 30th of March 1816, containing a further account; and I observe that that further account represents that the balance

belonged to the said four sons of the testator, *Sarkies ter Johannes*, and which were received by *Fairlie*,

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on the general account was there liquidated, and there was a sum of 1,483 *l.* due upon that account only to Messrs. *Sarkies* and Brothers; still the balance on the general account upon the whole, taking it altogether, was a sum of 8,000 *l.* and upwards in favour of *Fairlie*, *Bonham & Co.*, and I presume that at that time they could not have received the letter of the 5th of *October* 1815, for without doubt they would have noticed it, but we find that they did receive that letter some time in the year 1816, and reading the letter of the 29th of *June* 1816, which really appears to me, though it may not be called an assertion of right, is a civil remonstrance against the claim which the other side made, and therefore it was an assertion of right to the extent to which, in common politeness, they thought they were at liberty in the first instance to go generally in protesting against the claim which was made, and I think it no objection to their right, if they had the right, that they did not put their right in more distinct terms; and I apprehend, unless they had a lawyer at their elbow, with whom they could have conferred, it would have been impossible for them to state the whole of their right, as it might ultimately stand. Then on the 15th of *August* 1816 they make another reference to the demand on the transfer of the dividends, with which they do not comply. Then they represent again, that on the statement of all accounts as they then stood, there appeared to be a balance, it might have been of 11,000 *l.*, or thereabout, or 9,000 *l.*, and they offered to draw in respect of that balance a bill of 50,000 sicca rupees. Well, then, it appears that in the interim the death of *Marterose* had been notified, but that made no difference with respect to the mode of dealing.

Now Mr. *Pepys** says that Messrs. *Fairlie*, *Bonham & Co.* have no right to apply the sums of money that they might receive in respect of dividends, or use any power they might acquire over the stock, for the purpose of liquidating that general balance, unless by contract, whereas it rather appears to me that the converse of the rule is the case, and they cannot be asked to give up the dividends that they receive, or resign the legal power which they have acquired, without having the balance paid to them, unless there was a contract that it should be so. Supposing there had been no contract at all, it does appear to me not only consistent with natural justice, but there is a rule as to that in the Court, that is, that they who come for equity shall not have it unless they will do equity: it is contrary to equity to ask to displace a legal right, and parties I apprehend are not at liberty to do that, unless they will give to the parties, against whom they claim, that which, on a general view of justice, is their due. Now, I am quite free to admit, that possibly the parties never did contemplate, at the time when the power of attorney was sent over, and the administration had actually been obtained by *Hartwell*,

* Then of Counsel for the Plaintiffs in the cause.

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that would give to Mr. *Hartwell*, as one of the house of *Fairlie, Bonham & Co.*, a general *lien* over the fund as against all the parties, whose interests were such as that they could be bound by that act; but my opinion is, that if by any accident *Fairlie, Bonham & Co.* did acquire the legal dominion over the fund as against those parties with whom they were dealing in this mercantile account, they would have had a right at any time to say, "We will use our legal power to the utmost, unless you will first of all do us equity, which natural justice points out, namely, pay us the balance that is due from you;" and it appears to me, therefore, that inasmuch as there is no clear contract that it should be otherwise, and inasmuch as the only fair result, in my mind, of the directions which were given in the month of *August 1812* were, that the separate accounts should be kept, you are not at liberty to say that Messrs. *Fairlie, Bonham & Co.* had entered into a contract, whereby they were to place themselves in the tantalising position, that they were to receive the dividends coming from the stock, and not to receive them in liquidation of the balance due to them on their account, and thus place themselves in a situation in which they must hand over the dividends, and still see their own balance unpaid, and it is clear to me that the parties all along dealt on the supposition that those accounts should be closed. And in answer to the observation made with respect to this very letter, which was written by them after they had received the first notification of the demand that they should transfer the dividends to *Bazett & Co.*, it appears they had at that time drawn their bill for 15,000 *l.*, which they continually might have expected to have been honoured, therefore it was not necessary for them at that time to make more than they did then—that little remonstrance.

My opinion, therefore, is, this being a case in which beneficial owners of the stock are seeking to have the act of the executors set aside—but we are dealing only with the act of the executors, not so much *quasi* executors as *quasi* the beneficial owners—that we are at liberty to say in a court of equity, that, inasmuch as the residuary legatees, stating themselves to be such, dealing with *Fairlie, Bonham & Co.*, as such do authorise *Fairlie, Bonham & Co.* to acquire the legal power over the fund, *Fairlie, Bonham & Co.* may say, You have given us a power, and now we will use it. I should say therefore, as against the ultimate survivor, that as he represents the house he is not to take away the *corpus* of the fund to which he is now become entitled, unless he does equity by satisfying his balance. My opinion, therefore, is, that this is a case in which *Fairlie, Bonham & Co.* are entitled first to have the dividends, as far as there were dividends, received from the shares, applied in satisfaction of their account, and then, as far as *Bectan's* share remains, they are entitled to apply it in satisfaction of the balance due to them; and Mr. *Agabeg*, in his capacity of assignee under the deed of 1817, took only an equity, and therefore can only take the property subject to the prior equities.

and that they were also entitled to the one-third share of *Bectan Sarkies*, in the said 50,000 *l.*, and to the dividends and accumulations of his one-third share, in or towards payment of the debts due to them by the firm of *Johannes Sarkies & Co.*; and as ordered that the Master should take an account of what was due to the defendants, *Hartwell, Innes, and Brasier*, as surviving partners of the said firm of *Fairlie, Bonham & Co.* from the defendant, *Bectan Sarkies*, as surviving partner of the firm of *Johannes Sarkies & Co.*, in respect of the dealings and transactions between the said firms, and he prayed that the said cause might be re-heard before his Lordship, and that it might be declared that he (*A. Agabeg*) was entitled to the share of *Bectan Sarkies & Co.*, and to the arrears of the dividends on such share, and on the share of *Carapiet Sarkies*, and that the same might be transferred and paid to him accordingly.

A. Agabeg died in *December* 1832, having made his will, and letters of administration of his personal estate, with the will annexed, were granted to the Appellant, *James Colvin*. *W. Fairlie* and *H. Bonham* having died during the pendency of that appeal, the Appellant and the surviving plaintiffs filed their bill of revivor against the surviving defendants in *February* 1834, and the suit was revived accordingly: and the appeal coming on to be heard before the Lord Chancellor, in *April* 1834, his Lordship, after taking time to consider the case, affirmed the Vice-Chancellor's decree, without costs, by an order dated the 22d of *May* 1834 (*b*).

(*b*) The following is from the shorthand writer's notes of the Lord Chancellor's judgment, also referred to at the bar.

The *Lord Chancellor**:—In this case, on which I intimated a strong opinion in the course of the argument, it was so materially

* Lord Brougham.

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The Appellant then presented his petition of appeal to this House, from the above stated part of the Vice-Chancellor's decree and the order of the Lord Chancellor affirming it.

Mr. *Wigram* and Mr. *Teed* for the Appellant.

There was no contract, expressed or implied, between the Messrs. *Sarkies*, Brothers, and the Respondents, or any of them, that could entitle the Respondents to a lien on the 50,000*l.* three per *cent.* bank annuities, or on the dividends thereon; and without contract no such lien could exist. On the contrary, the letter written by the four brothers to *Fairlie, Bonham & Co.* the 21st of *November* 1812, directed the account of the dividends of the fund to be kept distinct from their mercantile accounts; and accordingly the accounts were kept distinct, and regularly transmitted in that form to the brothers in *India* until the year 1815, when *Fairlie, Bonham & Co.* furnished an account, showing a balance of upwards of 15,000*l.* in their favour, upon the mercantile transactions. By another letter, dated the 14th of *November* 1813, the surviving brothers desired the stock to be transferred to their own names. The Appellant does not deny that the house of *Johannes Sarkies & Co.* was largely indebted to *Fairlie & Co.*, but he confidently submits, that Mr. *Hartwell*, as the adminis-

shaken by the very elaborate and able reply of Mr. Solicitor-general*, that I took time to consider, but upon fully considering the case, I remain of the opinion which I originally had, and am disposed to affirm the decree without costs. I do not say it is a case which appears to me by any means clear or free from doubt. I was certainly shaken by the argument of the Solicitor-general in the reply, but I cannot think that my opinion is so materially changed as to justify me in dissenting from the Court below. On the whole, I think his Honor came to the right conclusion.

* Sir C. C. Popham.

trator, with the will annexed, of the testator *Sarkies ter Johannes*, was not, when the assignment of the 28th of *March* 1817 was executed, and when he received notice of it, and is not now, entitled, as against the assignees of *Carrapiet Sarkies* and *Bectan Sarkies*, to retain their shares, or the share of *Bectan Sarkies*, of the 50,000*l.* Bank annuities and dividends, for the payment of any debt owing by the house of *Johannes Sarkies & Co.* to the house of *Fairlie, Bonham, & Co.* The Vice-Chancellor, by his judgment, put the claim of the Respondents on the principle, that, if you come to a court of equity for its aid to enforce a right, you will be required first to do equity. But that principle was not applicable to this case. This was a trust fund, and was wholly distinct from the general business transactions of the parties. His Honor's judgment could not have received the assent of the Lord Chancellor, had it not been for the necessary absence of the leading counsel for the Appellant at the opening of the appeal; the junior, who was obliged to go on, only reading his brief, whereupon the Lord Chancellor intimated to the leading counsel for the Respondents his opinion, that there was no occasion for him to offer any arguments, and therefore the case was not argued. The reply however afterwards made by the Solicitor-General, who had then been able to attend, made such an impression on the Lord Chancellor that he said he entertained doubts on the question; but his Lordship, notwithstanding, affirmed the Vice-Chancellor's decree. These judgments in the courts below leave this position on their records, that because parties coming into court to claim a trust fund are found to owe a debt, and have not offered to pay it, the creditors are to have a *lien* on the fund claimed.

The power acquired by Mr. *Hartwell* over the fund

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was given to him by the legatees for a purpose distinct and separate from their mercantile concerns and engagements, and he and his partners engaged to procure the fund to be transferred into the names of the legatees, and to place the dividends, when received, at their disposal. All the interest which *Carrapiet* and *Bectan Sarkies* had in the stock at the time of the execution of the assignment passed to *Agabeg* and his co-trustees for the benefit of themselves and the other creditors of the assignees, and the Appellant now representing the assignees is entitled to the same. By the terms of the assignment, the assignees had power to dispose of the stock, and apply it according to the trusts, so that the case of *Pope v. Whitcombe* (c), where no interest had vested in the assignee, could not aid the Respondents; it was rather an authority for the Appellant. The interest of Mr. *Hartwell* in the stock was the interest of the legatees named by the testator, of whom Mr. *Hartwell* was only the administrator. But even if this were a question of set-off, the Respondents could not retain against the claim of the Appellant, the assignee of two of the sons, a debt due to them from the whole firm of *Sarkies & Co.* It was not held by either the Vice-Chancellor or Lord Chancellor that the power of attorney given to the house of *Fairlie, Bonham & Co.* was intended by any of the parties to be a security for advances by the latter to the brothers *Sarkies*.

Mr. *Pemberton* and Mr. *Knight* (Mr. *Blunt* with them) for the Respondents:—This is an appeal by one of the several plaintiffs in the Court below, which is an objection to the regularity of the appeal on

(c) 3 Russ. 124.

which the House would decide. In the Court of Chancery it was usual for one of several defendants to appeal, but not for one of several plaintiffs.

One question on the merits is what construction is to be put on the deed of assignment. It is insisted, for the Appellant, that the whole interest of *Carrapiet* and *Bectan Sarkies* in the fund passed by the assignment. The Respondents, on the other hand, contend that the fund cannot, upon any principle of equity or justice, be taken out of their possession until the debt contracted on the faith of the fund is paid to them. The Vice-Chancellor did not use the word *lien* in giving his judgment, but he said the Respondents were *entitled* to hold the fund until their debt was discharged. But whether the claim of the Respondents is to be called *lien* or not is quite immaterial, the justice of the demand remains the same. The case of *Pope v. Whitcombe* (*d*) was quite applicable to this; that was also a creditor's suit, and it was there held that the assignment of all her estate and effects by a person entitled to a residue under a will, after the death of a person to whom the interest of the residue was given for life, did not pass any interest in the residue. The transactions in respect of which the credit was given by the Respondents to the firm of *Sarkies & Co.* fell within the doctrine of set-off, as stated by Lord *Eldon* in *Vulliamy v. Noble* (*e*), where his Lordship, upon a second argument, allowed a joint debt to be set off against a separate debt. The debt of a surviving partner may be treated as his own debt, and set off against a demand he has in his private right: *Slipper v. Stidstone* (*f*), *French v. Andrade* (*g*). *Carrapiet* and *Bectan Sarkies* were

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the surviving partners of this firm, and after *Carra-piet's* death Messrs. *Fairlie, Bonham & Co.* had a right to set off the debt of the partnership against *Bectan*, the survivor. In cases of mutual demands a court of equity will take advantage of slight circumstances to do both parties justice, and will hold the balance of the accounts only to be the debt: *Jeffs v. Wood* (*h*). The plaintiff coming to the court of equity ought to be ready to do equity, especially as the Respondents, if deprived of the benefit of this fund, must lose the whole of the debt due to them. To prevent such injustice, a court of equity would lay hold of very slight circumstances: *Shish v. Foster* (*i*).

It was a misconstruction of the Respondents' letter of the 10th of *February* 1816, to say that it was calculated to lead the Messrs. *Sarkies* to believe that the stock was transferred to their own names. They say, "We have exhibited these documents at the Bank of *England*, where they have been registered, and your names inscribed as trustees under your father's will for the transferring of your stock in equal shares to each of you upon the expiration of ten years after the day of his death agreeably to his destination. There is therefore ample time to prepare the certificate of the date of that event, and the arrangements which you may then have determined upon. In the meantime we will continue to receive the dividends on the stock as before, to be at your disposal." Their letter of the 29th of *June* 1816 clearly showed that they did not intend to part with the fund until their debt was paid. "We have," they write, "to acknowledge the receipt of your favour of the 5th of *October* 1815, desiring us to pay Messrs. *Bruce, Bazett & Co.* here

(*h*) 2 P. Wms. 128.

(*i*) 1 Ves. sen 87.

the dividends as they arise on the 50,000 *l.* consols in the stocks. From the state of your account current which we sent you in *March*, you will see that we cannot with any decency be called upon to pay away any funds that can assist in reducing our heavy advance, &c. But this particular fund is the last of all that we should have expected to be diverted from its usual channel, as it must for many years necessarily pass through our hands from the confidence reposed in us by the late Mr. *Sarkies*." How could it be contended after that letter that the Respondents had represented that they had actually transferred the stock?

It was important to bear in mind that all the dividends were considered as partnership property, as between both firms. If all the partners in the firm of *Fairlie, Bonham & Co.* had joined in taking out the administration, there could be no question of their right to retain the dividends towards payment of their advances. They have dealt with the fund just as if they had all joined in the administration. Their Lordships would not make any distinction because Mr. *Hartwell* alone, and not all the partners, took out the administration. The soundness of the decree appealed against does not depend on the opinion of the present Vice-Chancellor and of Lord *Brougham* only, for Sir *John Leach*, Vice-Chancellor, refused a motion for an order on the Respondents to pay the dividends into Court, and Lord *Eldon*, Chancellor, affirmed that order with costs. Without giving undue importance to decisions on interlocutory motions, still it was fair to presume that Sir *John Leach* and Lord *Eldon* held the same opinion that Sir *Lancelot Shadwell* and Lord *Brougham* held in this case.

The forms in which the accounts were transmitted by the Respondents to *Sarkies & Co.* showed clearly

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that the dividends on the stock were considered by both houses as partnership property. The accounts were mixed accounts, and comprised all the dealings and transactions between the parties. The Respondents continued to receive the dividends under the first power given to them by the testator, and to place them to the credit of *Johannes Sarkies & Co.*, as they used to do under the old authority. The four sons were the owners of the fund as long as they lived ; they were all the partners in the firm, and so after some of them died, the survivors were owners of the fund, and also constituted the firm, until *Bectan* alone surviving became interested in the third share of the stock ; and he alone represented the firm and the firm's liabilities.

Mr. *Wigram*, in reply :—The answer to the formal objection, that one only of the plaintiffs appealed from the decree, is that *Aviet Agabeg*, who is represented by the Appellant, was the only plaintiff below who did not obtain all that he asked for by the decree ; all the other plaintiffs having obtained what they asked had no occasion to complain, and it would be improper to make them parties to the appeal : *Smith v. Snow* (*k*). In that case persons against whom the bill could not pray any relief, being made parties, a demurrer by them to the bill was allowed. The appeal in this case from the Vice-Chancellor to the Lord Chancellor was brought by *Agabeg* alone, and this objection was not then made. The same appeal is now brought here. If any objection could be taken to the form of the appeal, it should have been taken before the Appeal Committee, and of that opinion were their Lordships in the appeal of *Attwood v. Small*, when that appeal came to be argued in 1836.

(*k*) 3 Madd. 10.

With respect to the effect of the deed of assignment, it was clearly the intention of the *Sarkies* to assign all their effects for the purpose of paying their debts. The effects in *England*, and therefore the stock and dividends, were undoubtedly included. It was impossible to argue seriously that this fund was not intended to be assigned, and that it was not assigned. From the refusal, by Sir *J. Leach* and Lord *Eldon*, of the order on Mr. *Hartwell* to pay the dividends into court, no argument could be drawn against the Appellant's present demand. Lord *Brougham* expressed doubts of the propriety of the Vice-Chancellor's decree, although he assented to it.

The argument for the Respondents proceeded upon the footing of *lien*, mutual credit, set-off, contract, &c., in vague and general terms, but in truth, no one point was relied on to sustain the decree. There was no case for set-off. There was no mutual credit. The amount of this fund was separate and distinct from the mercantile accounts. Whether Mr. *Hartwell*, in his character of administrator, was distinct from his firm or not, was not a matter that could affect the Appellant's right; but still to make the Appellant's case the stronger, he had a right to contend that Mr. *Hartwell* was distinct from the firm in his character of administrator; he was sole administrator; the Messrs. *Sarkies* desired that this property should be kept distinct from their other transactions, and Messrs. *Fairlie, Bonham & Co.* agreed to keep it distinct. The power of attorney was given for the limited purpose of receiving the dividends, and it was revocable at any time at the will of the executors. The administration necessarily taken out here enlarged the power. Notwithstanding the enlarged power, still the firm of *Fairlie, Bonham & Co.*

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wrote to the *Indian* firm, to the effect that they had given them complete dominion over the stock by transferring it into their names, limiting their own power to the receiving of the dividends. The letters written by *Fairlie, Bonham & Co.* showed that they did not conceive that they had any *lien* on the fund.

December 12.

The Earl of *Devon* :—My Lords, there is a case of *Colvin v. Hartwell* and others, which was heard before your Lordships some time ago, by my noble and learned friend on the woolsack, and a noble and learned friend (*l*) now absent. I have had several discussions with those noble Lords, and I believe I am authorised to say there is not any difference of opinion whatever between those who heard that case; and I will therefore now proceed to move the judgments of your Lordships upon it. I will first take the liberty of stating the view which I take of the case. For the expressions used in that statement, only I myself am, of course, answerable; but in the result I am authorised to state, that the noble and learned Lord who is absent perfectly agrees in the view I am about to state to your Lordships. My noble and learned friend who is present will state his own view.

The first point to be considered in this case is, whether the assignment of the 28th of *March* 1817 carried the stock in question to Messrs. *Colvin, Mathews*, and *Agabeg*, as trustees for the creditors of *Carrapet* and *Bectan Sarkies*; because, upon this question the right of the Plaintiff to sue must depend. I think the stock does pass by that assignment, so far as it was intended to pass it.

The main question then arises, viz. whether the

(*l*) Lord Lyndhurst.

house of *Fairlie, Bonham & Co.* is entitled to hold the third share of *Bectan Sarkies* in this stock, and the dividends received by them, as against such assignees, in virtue of any lien or claim in equity accruing to that house in consequence of the dealings between them. It is not pretended that there is any express contract giving such a right to the house of *Fairlie, Bonham & Co.* But it is supposed that such a right arises from the correspondence, and from the course of dealing between the parties. The correspondence and conduct of the parties do not appear to me to warrant any such conclusion. Immediately after the death of the father, the four sons write to *Fairlie, Bonham & Co.*, and desire them to continue to receive the dividends, which they desire may be placed to a separate account; and they forward a power of attorney, executed by their mother and themselves, as executrix and executors, and they draw a bill upon that house in *London*, which they state to be drawn "on account of above dividends." The same mode of drawing is continued; they draw "on account of," or "against the dividends." Messrs. *Fairlie & Co.*, in reply to that letter, on the 27th of *May* 1813, state that they have opened a separate account, to which they shall carry the dividends upon the stock, "which shall now be transferred into your names." If this had been done, no question, at least as to the capital of the stock, would have arisen. They then find that there must be an administration in *England*, and one of the firm takes out letters of administration as the attorney of, and on behalf of, the executors and executrix of the testator in *India*. Although this was necessary to give the legal power over the stock, I think that it does not in any way affect the beneficial interest in, or right to it.

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On the 14th of *November* 1813, the brothers write from *India* that they have no doubt the transfer is accomplished. After receiving this letter, *Fairlie, Bonham & Co.*, on the 4th of *June* 1814, write that the transfer had not then been made, but that they should, as soon as the books were open, make the transfer of the whole to the four names of the four brothers; the Bank not permitting a division to be then made. I do not perceive anything in the correspondence after this, date which could lead the *Indians* to think that the transfer was not made, or that their correspondents considered this stock as part of the general assets applicable to the general transactions of the house.

A power of attorney to receive dividends may, perhaps under certain circumstances, be properly held to be irrevocable, and to give a *lien* upon the stock itself. But the power of attorney here given does not appear to me to have any such character. It is the mere substitution of another hand for the hand of the owner, accompanied by directions as to the application of the fund to be received; and I cannot think that the letters of administration taken out under such circumstances vary the rights of the parties.

My difficulty is to find upon what known principle of equity the decree of the Courts below is to be supported. It is a fallacy to apply to this case the principle that "he, who comes for equity, must do equity." I conceive the true meaning of that maxim only to be this, that a man, who comes to seek the aid of a Court of Equity to enforce a claim, must be prepared to submit in that suit to any directions which the known principles of a Court of Equity may make it proper to give. It may not be equitable in the popular sense of the word, that is, it may not be fair as between

man and man, that the *Indians* should have taken the disposition of the dividends of the stock out of the hands of those who were their creditors in *England*, in order to make them available in the way of security to their creditors in *India*. But the question comes back to this, is there any principle or rule of a Court of Equity, which prevents their doing this? I, for one, do not see my way to the conclusion that the house in *London* had such a lien or right to the funds in question as to prevent it. If either of the *Indians* had come to *England*, and appeared at the Bank to receive the dividends, I believe that they could have taken them, and this act would at once have revoked the power; and I do not find evidence of any contract, express or implied, which was sufficient to prevent this step.

My Lords, I do not see that any of the cases cited warrant the judgment given in the Court below. This is a case rather of fact than of law, and must depend upon its own circumstances; and upon the whole, I cannot help feeling that there is no sound ground upon which the Respondents can protect themselves from accounting for the dividends which have been received and which have not been already accounted for; or upon which they can maintain any right to the stock. I should, therefore, my Lords, in conformity to that opinion, humbly move your Lordships that this judgment be reversed.

The *Lord Chancellor*:—My Lords, having been counsel in this case when argued in the Court of Chancery, I was very desirous that the two noble and learned Lords who attended the hearing at your Lordships' bar, should make up their own minds as to the course to be adopted by this House, before I

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expressed any opinion of my own. Those two noble and learned Lords having had time to consider the case, have come to the conclusion that the judgment of the Court below is a judgment which cannot be supported. I abstain from entering any further into the case than simply to express my entire concurrence in that opinion. It will be absolutely necessary for your Lordships to state that the declaration in the decree made in the Court below cannot stand. Of course, that declaration in the decree will be reversed ; and in lieu of that, there will be some alterations in the decree which must be minutely considered, before the order of the House is made.

The following order and declaration were made by their Lordships:—

It is *ordered* and *adjudged* by the Lords, &c., that the said order of the Court of Chancery of the 22d of *May* 1834, so far as the same directed that the order of the *Vice-Chancellor* of the 18th of *February* 1833, should be affirmed, be, and the same is hereby reversed : And it is further *ordered* and *adjudged* that the said order of the 18th of *February* 1833, so far as the same declares that the firm of *Fairlie, Bonham & Co.* are entitled to the dividends on the 50,000*l.* Bank three per cent. annuities, which belonged to *Johannes Sarkies, Carrapiet Sarkies, Bectan Sarkies, and Marterose Sarkies*, the sons of the testator *Sarkies ter Johannes*, and which were received by them, the said *Fairlie, Bonham & Co.*, up to the time of the respective deaths of the said *Johannes Sarkies* and *Carrapiet Sarkies*; and that the said Messrs. *Fairlie, Bonham & Co.* are also entitled to the one-third share of the said *Bectan Sarkies*, in the 50,000*l.* Bank three per cent. annuities, and to the dividends and accumulations of his said one-third share, in or towards payment of the debt due to them by the firm of *Johannes Sarkies & Co.* ; and so far as the same orders and decrees that the Master of the said Court of Chancery, to whom the said cause stood referred, should take an account of what was due to the said defendants, *G. Hartwell, J. Innes* and *S. Brusier*, as surviving partners of the said firm of *Fairlie, Bonham & Co.*, from the said defendant, *Bectan Sarkies*, as surviving partner of the said firm of *Johannes, Sarkies & Co.*, in respect of the dealings and transactions between the said firms, be, and the same is hereby reversed : And it is declared that, instead of such declarations and orders as aforesaid, the said Court of Chancery ought to have declared, and it is hereby declared, that the late

defendant, *Aviet Agabeg*, deceased, as trustee under the indenture of assignment of the 28th of *March* 1817, was, and the said appellant, *James Colvin*, as his administrator, now is, entitled to the said one-third share of the said *Bectan Sarkies* in the said sum of 50,000 *l.* Bank three per cent. consolidated annuities, and to the arrears of the dividends on such share since the month of *December* 1817, being the time when the said firm of *Fairlie, Bonham & Co.* received notice of the execution of the said indenture of assignment, and to the arrears of the dividends which became due after the month of *December* 1817, on the share of *Carrapiet Sarkies*, in the same Bank annuities, during his life : and that the said Court of Chancery ought to have ordered that the Master, to whom the said cause stood referred, should take an account of what had been received by the defendants *G. Hartwell, J. Innes* and *S. Brasier*, and by *W. Fairlie* and *H. Bonham*, both deceased, in their lifetime, in respect of such dividends. And with this declaration, it is further ordered that the cause be referred back to the said Court of Chancery, to do therein as shall be just and consistent with the said declaration.

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IN COMMITTEE OF PRIVILEGES.

The VAUX Peerage.

1836 :
 March 3. 10.
 17. 29 & 30.
 April 19. 26.
 May 6. 13. 20.

1837 :
 Feb. 28.

*An ancient
 Barony—How
 created.
 Evidence.
 Practice.*

ON a claim by coheirs to the dignity of a Baron, created in the reign of *H.* 8, and in abeyance from the reign of *Car.* 2, they proved that their ancestor sat among the Peers in Parliament in the 25th of *H.* 8; that he was duly summoned to and sat in the Parliament of the 28th of *H.* 8, and that he and his heirs male—who were also his heirs general—were summoned to and sat in several succeeding Parliaments, by the style and title of Lord *Vaux*. To account for the want of evidence of a writ of summons prior to the sitting in the 25th of *H.* 8, they showed that there were no Lords' Journals extant from the 7th to the 25th of *H.* 8; that the enrolments of writs during that period were very imperfect; and that, although the Patent Rolls were complete, no patent or charter of creation of a barony of *Vaux*, nor any record or trace of such patent, was discovered, after the most diligent searches in all the offices for records. HELD that the barony of *Vaux* was created by writ of summons and sitting in Parliament, and was therefore descendible to heirs general.

Where there are several coheirs to a dignity, and some only claim it, they must give notice to the others.

The statements of chroniclers or contemporary historians are not admissible as evidence of the creation of a peerage.

The admission of an inscription in a churchyard by a former Committee of Privileges, does not make a copy from their minutes necessarily admissible in another case.

A paper writing found among an ancestor's papers, in the custody of a stranger in blood, and not signed by the ancestor, nor by any of his family, is not admissible to show the state of the family.

A funeral certificate from a manuscript book, intitled, "Funeral Certificates of the Nobility," produced from the Heralds' College, is admissible evidence of the state of the deceased's family, and of other statements contained in it.

GEORGE MOSTYN, of *Kiddington*, in the county of *Oxford*, esq., presented a petition to the King, in *August* 1835, claiming to be coheir to the barony of *Vaux* of *Harrowden*, which he stated to have been created by writ of summons and sitting in Parliament, in the reign of King *Henry* the Eighth; and praying his Majesty to determine the abeyance of the said barony in his favour, by directing a writ of summons to him for his attendance in Parliament, by the style and title of Lord *Vaux* of *Harrowden*.

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Edward Bouchier Hartopp, of *Little Dalby*, in the county of *Leicester*, esq., presented a similar petition to his Majesty in the month of *November* of the same year.

The petitions were referred by the King to the Attorney-General (*Sir John Campbell*), who made his reports upon them, severally, to his Majesty. The conclusion of the report on Mr. *Mostyn's* petition was in these terms: "There appears to me to be reasonable *prima facie* evidence of the petitioner's pedigree, as one of the coheirs of the last Lord *Vaux* of *Harrowden*; but a question of great difficulty arises as to whether, under the circumstances stated, it is to be considered that there was a barony of *Vaux* of *Harrowden* by summons and sitting, descendible to heirs female. Upon this question I do not give any opinion; and, upon the whole, I humbly advise that your Majesty should be pleased to refer the case to the House of Lords." His Majesty accordingly, in *February* 1836, referred both petitions to the House of Lords, together with the Attorney-General's reports on them; and they were referred by the House to the Committee of Privileges, who met, first on the 3d of *March* 1836, and afterwards by adjournments to several days in that month

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and in the months of *April* and *May* following, to hear counsel and witnesses for the claimants.

Mr. *Lynch* (with whom was Mr. *Fleming*) opened the allegations of Mr. *Mostyn's* petition, confining himself, in pursuance of the Committee's directions, to the matter of law suggested in the Attorney-General's report, in the first instance.

Sir *Harris Nicolas* (with whom was Mr. *Bullock*) followed the same course in stating the allegations of Mr. *Hartopp's* petition.

The cases made for both the claimants were substantially the same, so far as they related to the creation of the dignity and its descent, until it fell into abeyance between the sisters and coheirs of *Henry* the last Lord *Vaux*, in 1663. From that point in their pedigree they claimed adversely, each insisting that the coheiress, from whom he was descended, was the eldest of the sisters, who left issue. They agreed in stating that the barony of *Vaux* of *Harrowden* was created by writ of summons to, and sitting in, Parliament in the reign of *Henry* the Eighth. Sir *Nicholas Vaux*, knight, who died on the 14th of *May*, 15th of *Henry* 8 (1523), was styled Lord *Vaux* of *Harrowden* in his will, and in several public instruments dated after his death. That he was "advanced in the 27th of *April*, in the 15th of *Henry* 8, to the dignity of a baron of the realm, with some others," is stated by *Dugdale* in his *Baronage* (a), upon the authority of a passage in *Stowe's Annals* (b), to this effect: "The 27th of *April* (15th *Henry* 8), was Sir *Arthur Plantagenet*, at *Bridewell*, created Viscount *L'Isle*; Sir

(a) 2 Vol. 304.

(b) 2 Vol. 520.

Maurice Berkeley was made Lord *Berkeley*; Sir *William Sandys*, Lord *Sandys*; and Sir *Nicholas Vaux*, Lord *Vaux*." There was no legal evidence of the creation of any dignity in Sir *Nicholas Vaux*, or of his sitting in the House of Lords; but it appeared by the Journals (c), that his son and heir, *Thomas Lord Vaux*, who was about the age of 14 at his father's death, sat in the House on several days in the 25th *Henry 8* (1534), above barons who were created in the 21st *Henry 8*; and it appeared by writs of summons, and also by the Journals, that he was duly summoned to, and sat, in the Parliament that was summoned in the 28th *Henry 8* (1536), and in several succeeding Parliaments during that reign, and the reigns of *Edward the Sixth* and of *Philip and Mary*, by the style and title of Lord *Vaux of Harrowden*. He died some time in the year 1557, and was succeeded by his son and heir *William Lord Vaux*, who was summoned to, and sat in, several Parliaments, from the 4th and 5th of *Philip and Mary*, down to the 35th of Queen *Elizabeth*. He was twice married, and had issue, by his first wife, *Henry Vaux*, who died in his lifetime without issue; and by his second wife, *George Vaux*, who also died before him, leaving six children born, according to Mr. *Mostyn's* pedigree, in this order: *Mary, Edward, William, Henry, Joyce* and *Catherine*: while, in Mr. *Hartopp's* pedigree, *Mary* was placed last of the six. Upon the death of *William Lord Vaux, Edward*, his grandson and heir, then about the age of seven, succeeded to the barony, but was not summoned to Parliament until the 18th of *James 1* (1620). In that and the succeeding reigns, he was regularly summoned to, and

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(c) 1 Vol. 62. 64. 68, 69. 81.

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sat in, several Parliaments, with the precedency of a baron created in the early part of the reign of *Henry 8 (d)*. He died in the 13th *Charles 2* (1661), without issue; and *William*, his next brother, having previously died without issue, *Henry* his surviving brother and heir succeeded to the barony, but there was no evidence that he was summoned or sat in Parliament. Upon his death, without issue, in *September 1663* (15 *Chas. 2*), the dignity fell into abeyance between his sister *Joyce* and the representatives of his two other sisters *Mary* and *Catherine*, both then deceased. *Joyce Vaux* died unmarried in *May 1667*.

Mr. *Mostyn* derived his descent from *Mary Vaux*, whom he stated to be the eldest of the three sisters. She married Sir *John Simeon* of *Brightwell, Oxfordshire*, by whom she had issue a daughter and sole heir, *Elizabeth Simeon*, who married *Edmund*, fourth Lord Viscount *Mountgarrett* in *Ireland*, by whom she had issue *Edward Butler* of *Ballyraggett*, in the county of *Kilkenny*, the father of *Edmund Butler*, who died without issue, and of *George Butler* of *Ballyraggett*, who became the sole heir and representative of the said *Mary Vaux*, and whose grandson and heir, *George Butler*, esq. of *Ballyraggett*, died in or about the year 1811, leaving an only daughter and sole heir, *Maria*. She intermarried with *Charles Mostyn*, of *Kiddington*, Esq., by whom she had an only son, *George Mostyn*, the claimant, now sole heir of the said *Mary Vaux*, sister of *Henry*, the last Lord *Vaux* of *Harrowden*.

Catherine Vaux, the other sister, married *Henry Lord Abergavenny*, and had issue by him, two sons, *John Lord Abergavenny*, who died without issue in

(d) 3 Lords' Journals, 4. 201-209. 435-437.

1660, and *George Neville*, who then became Lord *Abergavenny*, and died in 1666, leaving issue one daughter, *Bridget Neville*, and an only son, *George Neville*, who succeeded to the barony of *Abergavenny*, and died without issue in 1695. *Bridget Neville* married Sir *John Shelley*, bart., and had by him issue an only child, *Frances Shelley*, who married *Richard Viscount Fitzwilliam*, in *Ireland*, by whom she had three sons, *Richard*, *William*, and *John*; and two daughters, *Mary* and *Frances*. *Richard*, the eldest of the three sons, became the sixth Viscount *Fitzwilliam* on the death of his father, in 1749, and died in 1776, leaving four sons, all of whom died without issue; and the said *William* and *John*, the brothers of the said *Richard*, also died without issue, and the barony of *Fitzwilliam* became extinct. *Mary*, one of the two sisters, married *Henry*, ninth Earl of *Pembroke*, and her great grandson *Robert*, the present Earl, is her heir, and one of the heirs of the said *Catherine Vaux*, and of the coheirs of the barony of *Vaux*. *Frances Fitzwilliam*, the other daughter of the said *Richard Viscount Fitzwilliam* and *Frances Shelley*, married the Hon. *George Evans*, who, on the death of his father, *George Lord Carberry*, in *Ireland*, succeeded to that dignity, and died in 1759, leaving issue by the said *Frances*, besides other children, his eldest son *George*, who succeeded his father as Lord *Carberry*, and had by his second wife a son, an only child, *George*, who succeeded him in that barony in 1783, and died without issue in 1804; and by his second wife, a daughter, an only child, *Juliana*, who, in 1782, married *Edward Hartopp Wigley*, esq., of *Little Dalby*, in *Leicestershire*, and had issue by him, *Edward Hartopp*, who died in 1812, leaving the claimant, *Edward Bouchier*

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Hartopp, his son and heir, who, and the said *Robert* Earl of *Pembroke*, are the only heirs of the body of the said *Catherine Vaux*, and coheirs with *Mr. Mostyn* of the said *Henry*, last Lord *Vaux*.

With respect to the principal question, whether the barony of *Vaux* was a dignity descendible to heirs general, the learned Counsel for the claimants—who had the same interests in that question—said, the rule of law applicable to ancient baronies was, that if no patent or charter creating any such barony could be discovered, it must be considered to have originated in a writ of summons, in the usual form; although no record of the first writ can be produced. The House of Lords, acting upon that rule, had, in several cases (*e*), allowed baronies to the heirs general, presuming, from the non-existence of patents or charters, that the ancestors had been summoned by writs, which was the usual mode of creating baronies in ancient times. The House always held it sufficient for a claimant to prove that his ancestors had been, on some occasion, summoned to and sat in Parliament, deeming it to be immaterial whether the enrolment of the first writ issued could or could not be shown. That practice was founded on a sound principle, for as it was impossible for any person ever to have sat in the House, as a peer of the realm, without having been duly summoned; the fact of his having so sat afforded a presumption, amounting to conclusive proof, that he had been summoned in the usual manner. In this case it would be shown, by negative

(*e*) The cases of the Baronies of *Sandys*, *Windsor*, and *Wentworth*, &c. here referred to, will be found stated at large in the speeches of Counsel summing up the evidence in this case.

evidence, that no patent of creation of the barony of *Vaux*, or trace of one, exists in any record office, or other depository, where such instruments are usually kept. It would also be shown, by like evidence, that the records of writs of summons to Parliament, and parliamentary pawns, from the 14th to the 21st of *Henry* 8, and again, from the 21st to the 28th of *Henry* 8, have been lost or destroyed; and the Lords' Journals, from the 7th to the 25th *Henry* 8, are not preserved. It would be further shown, that Sir *Nicholas Vaux*, the remote ancestor, was a commoner in the 7th of *Henry* 8, and that his son and heir, *Thomas*, sat in Parliament as Lord *Vaux*, in the 25th of *Henry* 8, and was summoned and sat in the 28th of *Henry* 8, and in subsequent Parliaments. The learned Counsel therefore submitted that, although there was no *legal* proof of the precise year or mode of creation of this barony, there were several facts, capable of being established by evidence, which would raise the inevitable conclusion that it was created between the 7th and 25th of *Henry* 8, either in Sir *Nicholas Vaux*, or in his son, *Thomas* Lord *Vaux*, by writ of summons to and sitting in Parliament, which mode of creation gave an estate in the dignity, descendible to heirs general.

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The Attorney-General, (Sir *John Campbell*), for the Crown, in answer to these arguments, submitted that the Committee were not bound to infer from the facts stated, even if they should be established by evidence, that this dignity originated in a writ of summons, in the general form. There was no doubt that *Thomas* Lord *Vaux* sat in this House in the 25th of *Henry* 8, and was summoned and sat in the 28th of *Henry* 8, with the precedence of a peer

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created on or before the 21st of *Henry* 8; but no inference could be drawn from precedency anterior to the Act of 31st of *Henry* 8, settling the order in which peers were thenceforward to be placed. He agreed that if this barony could be shown to have originated in an unrestricted writ of summons, such a writ and a sitting in Parliament by the person summoned would create a dignity descendible to heirs general. But in the absence of any proof of the warrant or authority by virtue of which *Thomas* Lord *Vaux* took his seat in the 25th of *Henry* 8, the Committee were no more bound to infer that it was by writ of summons without restriction, than they were to infer letters patent, or a writ limiting the descent of the peerage to heirs male of the body. A restricted writ of that nature^f was issued to *Bromflete*, creating him and the heirs male of his body Lords *Vescie* (*f*), in the reign of *Henry* 6. The creation of peers by letters patent, by which the peerage is usually limited to the heirs male of the body, were of frequent occurrence in the reign of *Henry* 8; and the non-existence or non-discovery of a patent now affords no proof that this title was not created by patent, which may have been lost, as in the *Purbeck* case.

There was no reason to suppose that Sir *Nicholas Vaux* was a peer, because he was mentioned as Lord *Vaux*, or Lord *Harrowden*, in some public instruments; for it was very common in former times to style a gentleman *dominus*, as bachelors of arts in the Universities are so called; or to designate him by the name of his mansion and estate. We even now say Lord *Coke* and Lord *Hale*, though they were not peers.

(*f*) Co. Litt. 9 *b*.

The writs of summons to *Thomas Lord Vaux*, in and after the 28th of *Henry 8*, were such general writs as are issued to all peers, however created, for every new Parliament. There is no writ, or record of a writ, mentioning any Lord *Vaux* prior to the sitting of *Thomas*, in the 25th *Henry 8*; and if the Committee were to presume such a writ, and to allow this barony to heirs female, as originating in an unrestricted writ, the result may be that letters patent may yet be discovered, and their Lordships would find that they had by mistake led to the creation of a new peerage, descendible to heirs general, which happened in the case of the barony of *Strange (g)*.

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The Committee, without giving any intimation of their opinion on the question, directed the parties to proceed with their evidence; and on objection made by the *Attorney-general*, against proceeding further in the absence of Lord *Pembroke*, the other coheir, their Lordships required proof of notice to Lord *Pembroke*; which the agents of the Petitioners accordingly supplied.

Claimants to
 a dignity to
 give notice
 to absent co-
 heirs.

The evidence taken in reference to the creation of the barony was as follows:—An indenture, dated the 7th of *Henry 8*, and made between that King on the one part, “and Sir *Nicholas Vaux* and Sir *Thomas Parre*, knights, on the other part,” concerning the wardship of *E. C.*, was produced to show that Sir *Nicholas Vaux* was then a commoner. An inquisition *post mortem*, and the commission for it, both dated in the 16th of *Henry 8*, after the death of Sir *Nicholas Vaux*, and a private Act of Parliament of

(g) This and the other cases referred to by the *Attorney-general* and by the Counsel for the Petitioners, will be stated in their arguments summing up the evidence.

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the 27th of *Henry* 8, were produced, to show that in them he was styled "*Nuper Dominus Vaux*," and "*Dominus Harrowden*." Parliamentary pawns, or enrolments of general writs of summons of peers and others to Parliament, in the 1st, 3d, 6th, and 21st years of *Henry* 8, were produced, and in none of them did the name of any Lord *Vaux* or *Harrowden* appear. Mr. *Holden*, the clerk of the patent rolls, in the Rolls chapel, who produced the originals of all these instruments, of which attested copies were given in, said he could not find in his office any enrolments of writs of summons from the 6th to the 21st of *Henry* 8, or from the 21st to the 28th of *Henry* 8. Mr. *Parrott*, clerk of the Journals in the House of Lords, produced the Journals for the 6th and 7th of *Henry* 8: the name of Lord *Vaux* was not in them. He said there were no Journals extant from the 7th to the 25th of *Henry* 8; and there were no writs delivered in by peers, on taking their seats, before the year 1663. He could not find any of them in the reign of *Henry* 8. From the Journals for the 25th of *Henry* 8 (*h*), he read the names of some Lords who were marked as present on the 27th of *January*, in the 25th of *Henry* 8; and among them *Dominus Vaux*, followed by *Dominus Windsor*, *Dominus Braye*, and other barons, who were created in the 21st of *Henry* 8, (as appeared *aliunde*). It appeared from the same Journal, that that was a meeting, after a prorogation, of a Parliament which was summoned in the 21st of *Henry* 8. Mr. *Holden* produced a close roll of the 28th of *Henry* 8, containing a writ of summons to Parliament, and the name "*Thomæ Domino Vaux, Chevalier*," appeared before the above-mentioned Lords. And the same name, with the

(*h*) 1 Lords' Journ. 62.

same description and precedence, appeared in the parliamentary pawns for the 30th, 33d, and 36th of *Henry* 8, and 1st of *Edward* 6, (of all which attested copies were given in); and it appeared, from the Journals, that he was present in the Parliament of 1st *Edward* 6, and in the Parliaments that followed it, down to the 2d and 3d *Philip* and *Mary*. Evidence was then given of his death, and of the successions of his son and grandson, *William* and *Edward*, respectively, to the dignity, and of their having been summoned to, and having sat in several Parliaments, and of their deaths without issue: and to show that *Henry*, third son of the said *George Vaux*, who died before his father, *Thomas*, Lord *Vaux*, succeeded his said brother *Edward*, in 1661, and died in 1663, without issue, his will was produced, and also an attested copy of this inscription on his tomb, in *Eye* church, in the county of *Suffolk*: “*Exiit ultimus Baronum de Harrowden, HENRICUS VAUX, Septemb, 20, Anno Dni. MDCLXIII.*”

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For the purpose of proving that there was no patent or charter of creation of the barony of *Vaux*, or privy-seal warrant for issuing such patent or charter, on record, and therefore of inferring that it was created by writ, the following evidence was given:—Mr. *Holden* said, that after the most diligent searches of the patent rolls, privy seals, and signed bills, from the 1st to the 28th of *Henry* 8; of the close roll of the 15th of *Henry* 8, and of the charter rolls for the whole of that King's reign, he did not discover any patent, or charter, or warrant, or bill for, or the slightest trace of, a patent for the creation of a barony of *Vaux* or *Harrowden*, Mr. *Panton*, clerk in the King's Remembrancer's office, searched with like diligence the memoranda and

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pipe rolls from the 21st to the 28th of Henry 8, and found no patent nor trace of a patent for the barony of *Vaux*. Mr. *Addington*, keeper of the records in the Court of Augmentations, said he searched the wardrobe account books of the 28th and 31st of *Henry* 8, the only books of that sort, and of that reign, preserved in his office, and he did not find in them any account of monies paid to Lord *Vaux* for creation-money. (It was usual in that age, when a peer was created by patent or charter, to make a payment of money to him to support the dignity.) Mr. *Jackson*, clerk in the Crown office in Chancery, said the earliest document in that office was a book commencing in the 37th of *Elizabeth* (i).

The statements of chroniclers not evidence of the creation of a peerage.

In order to show that *Thomas*, Lord *Vaux*, took his seat by special writ of summons to Parliament in the 22d of *Henry* 8, just after attaining his age of 21, a contemporary manuscript, preserved in the Herald's College, together with some statements from the chroniclers *Stowe* and Sir *W. Dugdale*, were tendered in evidence; but being objected to by the *Attorney-general*, they were rejected.

Upon the evidence produced by the claimants in support of their respective pedigrees, consisting of inquisitions *post-mortem*, wills, settlements, private Acts of Parliament, the Lords' Journals in *England* and *Ireland*, and parish registers—none of which were objected to—and also of monumental inscriptions, funeral certificates, and documents from the custody of strangers—which were objected to—the following points arose:—To show that *Edward*, Lord *Vaux*, died without issue, his will was produced, containing no notice of any child, and also an indenture of settle-

(i) See the evidence of these witnesses more fully, *infra*, p. 549.

ment executed by him and others, settling all his estates, subject to a jointure for his wife, on *Edward* and *Nicholas*, (afterwards *Nicholas*, Lord *Banbury*,) her sons, born during the life of the Earl of *Banbury*, her first husband. There was a schedule annexed charging the said estates with annuities for *Henry* and *Joyce*, the brother and sister of said settlor, showing that they were then living, and that his brother *William*, being not therein mentioned, was dead. This indenture was produced from the custody of the solicitor to General *Knollys*, who was the heir of the said *Nicholas*, and in 1811 an unsuccessful claimant to the *Banbury* peerage; and no objection was made to it. But on the production of another document from the papers of *Edward*, Lord *Vaux*, in the same custody, purporting to be an account of a steward, and showing the state of the then surviving members of the *Vaux* family, and affording an inference that *William* was dead, the Attorney-general objected to its reception, as not coming out of the proper custody; Lord *Banbury*, among whose muniments this document came into the possession of his heir, General *Knollys*, being no relation in blood to *Edward*, Lord *Vaux*.

The Committee, after hearing Mr. *Lynch* for the admissibility of the document, and the Attorney-general *contra*, refused to admit it, as, independently of the objection to the custody, it did not appear to be signed by any of the members of the *Vaux* family, nor to have been open to their inspection.

Mr. *Lynch*, in order to show that *Mary Vaux*, from whom Mr. *Mostyn* was descended, was the oldest of the sisters of *Edward* and *Henry*, Lords *Vaux*, put in the will of their grandmother Lady *Mary Vaux*, widow of *William*, Lord *Vaux*, and this extract was read :

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A document purporting to be a statement of an ancestor's family, but not signed by him or any of the family, and being produced by a stranger in blood, not evidence of the state of the family.

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“ I bequeath to *Mary Vaux*, the daughter of my son, *George Vaux*, 300 *l.*; and to *William Vaux*, her brother, 200 *l.*; and to *Henry Vaux*, *Joyce Vaux*, and *Catherine Vaux*, 100 *l.* a piece.”

Sir *H. Nicolas*, on behalf of Mr. *Hartopp*, contended that the order in which the testatrix mentioned her grandchildren, was no proof of the order of their birth. Indeed that inference was repelled by the fact that a larger legacy was given to *Mary*, which was so given most probably because she was the namesake and the godchild of the testatrix. She was mentioned last of the three sisters in a pedigree printed by Sir *W. Dugdale*, obtained by him from *Edward*, Lord *Vaux* (*k*).

Mr. *Lynch*, in corroboration of the inference drawn by him from the passage in the will, said he would produce evidence to show that upon the marriage of *Mary* with Sir *George Simeon*, in the 2d of *James* 1, *Catherine* was not above twelve years of age:—

An inquisition *post mortem*, dated the 18th of *James* 1, and taken upon the death of *John Simeon*, and reciting the marriage of his son Sir *George Simeon* with *Mary Vaux*, in the 2d of *James* 1, was then put in and read; and also an inquisition taken in the 10th of *James* 1, after the coming of age of *Edward* Lord *Vaux*, on his attainder for recusancy, in which was set forth a deed, reciting, among other things, that, “whereas also *Catherine Vaux*, sister of the said Lord *Harrowden*, is as yet unprovided of any present maintenance, or of any portion of money wherewith to advance her to a competent marriage agreeable to her honourable birth and degree, &c., this indenture witnesseth, &c., and to the intent and purpose that they (other parties to the deed) should raise, &c. out of

(*k*) Dugd. Baro. 2 Vol. 305.

the rents, &c. the sum of 1,500 *l.* for a portion for the said *Catherine Vaux*, &c. to be paid unto her, &c. at or on the day of her marriage, or when *she shall accomplish the full age of 19 years* :”—

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The learned Counsel observed that, upon reference to these dates, their Lordships would clearly see that *Catherine* was not, at all events, more than 12 years of age when *Mary* was married, and it was not reasonable to suppose that *Mary* was married under that age.

The Committee gave no opinion then on the point; but in giving their opinions afterwards on the question of law, they held that *Mary* was the elder sister.

In proving Mr. *Hartopp's* pedigree, Sir *H. Nicolas* proposed to give in a copy of a monumental inscription in a church, taken from the Committee's minutes of evidence in the *Banbury* peerage case.

A monumental inscription admitted in one case is not, as of course, admissible in another.

The *Attorney-general* objected, saying the inscription might have been proper evidence in the case mentioned, or might have been there admitted without inquiry. Both claimants had availed themselves extensively of the minutes of evidence before former Committees for Privileges. He did not know whether it was a rule of their Lordships' House to receive, as of course, the evidence on their minutes in other cases?

The Committee, by their Chairman, said there was no such rule. If the matter tendered was objected to, and could be supplied *aliunde*, as clearly an attested copy of a monumental inscription might, it could not be received in evidence.

The Counsel for Mr. *Hartopp*, in order to prove that *Catherine Vaux*, from whom he derived his descent, married Sir *Henry Neville*, and that he was the son and heir of *Edward Lord Abergavenny*, and

Funeral certificates taken by the officers of arms, by order of the Earl Marshal,

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and produced
from the
Heralds' Col-
lege, admis-
sible as evi-
dence of the
statements in
them.

succeeded him in that dignity, proposed to put in an extract from a funeral certificate, taken by the heralds on the death of said *Edward*, Lord *Abergavenny*, in 1622. This certificate was contained in a manuscript book, intitled, “*Funeral Certificates of the Nobility*,” and preserved in the Heralds’ College. They were taken, as stated by a witness, by an order of the Earl Marshal of *England*, under his seal, and dated 18th July 1568, directing to the effect, that, “every king of arms, herald, or pursuivant, that shall serve at any funeral as aforesaid, shall bring into the office of arms a true certificate, under the hands of the executors and mourners present at the said funeral, containing the day of the death, place of burial of the deceased, to whom married, what issue left, the age of such issue, and to whom married, &c.; to the intent that the said certificate may be registered, and remain as a perpetual record in said office.” The same witness, (rouge-dragon and pursuivant of arms), for the purpose of showing that the funeral certificate produced by him was taken on the death of the said *Edward*, Lord *Abergavenny*, produced a book of partition of fees among the officers of arms at the time, containing entries, made by those who attended the funeral, of such fees, and charging themselves with the monies so received, for the purpose of being divided among all the officers according to their degrees. The certificate which he produced had no signature, and he could not say whether it was an original or a copy.

The *Attorney-general* objected to the reception of the certificate; and, after examining the book of partition of fees, said it did not give any authority to the certificate, as the entries of these fees were signed by four officers of the college, who received them for their own benefit, and were not accountable to any

others. The ground on which memoranda were receivable in evidence was, that the person who made them was charging himself, and thereby becoming accountable to others. He admitted that if a burial certificate were produced, signed by one of the family, or by the executor, that would be evidence as reputation in the family, coming from persons cognizant of the facts therein stated; but this document was not evidence, resting only on the authority of the heralds, who knew nothing of the facts, and had not collected them on the deaths of the parties, as in surveys under commissions; and here the original or copy produced in the book did not appear to be signed by any one. Besides, the Committee on the *Banbury* claim refused to admit an original certificate of this sort, although duly signed.

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Sir *Harris Nicolas* and Mr. *Bullock* contended that the certificate was admissible to show the fact of the death of *Edward Lord Abergavenny*, and the succession of his son *Henry* to that dignity, and his marriage with *Catherine Vaux*, &c.: and the contemporaneous entries of the fees made by officers in the discharge of the business of their office, charging themselves with the receipt of money, distributable between themselves and others, were admissible to prove the authenticity of the certificate. The records of such certificates, without any further proof but that they were produced from the heralds' office, were admitted in the *Chandos* claim of peerage, 2d June 1802, and in the *De Roos* claim, 19th May 1804.

Extracts were then read from the minutes of evidence taken by the Committees in the two cases.

The Committee received the funeral certificate, on the authority of the cases referred to, and as an official

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document taken by persons whose duty it was to make it up.

The cases of both Petitioners having been closed, their respective Counsel were heard to sum up the evidence.

Mr. *Lynch* :—My Lords, Mr. *Mostyn's* claim to the barony of *Vaux* is derived from the eldest sister of *Henry*, last Lord *Vaux*. Having already addressed your Lordships on the nature of this barony, and having referred to some cases in support of my proposition, that it is a barony in fee tail, descendible to heirs general; and having particularly referred your Lordships to the cases of Lords *Strange* and *Wentworth*, which appear to me to be identical with the present, I shall now shortly call to your Lordships' attention the nature of the objections made by the Attorney-general to this case.

We have given in evidence a writ of summons in the 28th of *Henry* 8, by which *Thomas* Lord *Vaux* was summoned to Parliament; and we have given in evidence a sitting by *Thomas*, following that writ. I submit that that evidence is sufficient of itself to enable me to call upon your Lordships to say that this is a barony descendible in fee tail; but my learned friend says, it appears that *Thomas* Lord *Vaux* sat in Parliament in the 25th of *Henry* 8; and we have shown no prior writ of summons. We have not shown it, because the evidence is lost. The same argument was used in the case of the *Wentworth* barony; for Lord *Wentworth* sat in the Parliament of the 25th of *Henry* 8. There was no evidence of a prior writ of summons to him, but there was evidence of a subsequent writ issued to him in the 30th year of *Henry* 8, and that he sat subsequently; and this

House was of opinion that the barony of *Wentworth* was a peerage descendible to heirs general. It was impossible that evidence of a prior writ could be given. No special writ of the reign of *Henry 8* was ever recorded, and no general summons is extant from the 21st to the 28th of *Henry 8*. The name of Lord *Wentworth* appears in the latter, but is not in the former. If this had been a case of a barony granted prior to the reign of *Richard 2*, your Lordships would not have hesitated; but as between the reigns of *Richard 2* and *Henry 8* there were some few instances—eight or ten—of peers created by patent, and because in the time of *Henry 8* one barony was created by patent, and fourteen by writ, previously to the 25th year of that reign, my learned friend calls upon you to do that which has never yet been done—to presume, in this particular case, a patent containing a limitation to heirs male. Now it happens, fortunately for us, that the patent rolls in that reign are all perfect; on the other hand, that the enrolments of the writs of summons upon the close rolls are most imperfect; and that from the 6th to the 21st of *Henry 8*, no enrolment, or other record whatsoever of a writ of summons, is extant. The journals of the House are missing from the 6th to the 25th of *Henry 8*. Is not this, therefore, a case rather for the presumption of a writ than of a patent? I am not aware of any case in which a patent for a barony has been presumed; the only cases cited by my learned friend were those of the Viscounty of *Purbeck*, and of the Dukedom of *Richmond*; and even in those cases there was no decision upon that point. In the *Purbeck* case, the only question which this House decided was, simply that no peer could surrender his dignity by fine to the Crown. Upon the other two points raised, the legitimacy of the claimant, and the non-

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existence of the patent, the House refused to adjudicate. In the case of the Dukedom of *Richmond* there was no decision; nor, indeed, was that dignity ever claimed, or controverted. The House did not presume a patent in either the *Richmond* or *Purbeck* case. The case of a barony is much stronger against such a presumption, inasmuch as baronies were created by writ, as well as by patent, and up to the period of the 25th of *Henry* 8, creation by writ was the usual mode of creation.

Lord *Conyers* was created a baron by writ in the 1st of *Henry* 8, so decided by this House in a claim made by the Duke of *Leeds* to that barony. Lord *Monteagle* was created a baron by writ in the 6th of *Henry* 8. Lord *Vaux* is found in the journals of the House of that reign always placed after those two peers, as well before, as after, the statute of precedence passed in the 31st of *Henry* 8. It is, therefore, to be inferred, that the creation of the barony of *Vaux* was subsequent to those of *Conyers* and *Monteagle*. Your Lordships will find two extracts proved from the journals, establishing the precedence to which I have referred. Mr. *Parrott*, who produced the journals, read the last six names of barons on the 15th *November*, in the 25th of *Henry* 8: “*Monteagle, Vaux, Windsor, Wentworth, Burgh, Braye, and Mordaunt.*” Then being asked to turn to an entry in the early part of the reign of Queen *Mary*, he read, “On the 6th of *November*, 2 and 3 *Philip* and *Mary*, among the peers present is *Dominus Vaux.*” The last names are: “*Monteagle, Sandys, Vaux, Windsor, St. John, Burgh, Braye, Wentworth, and Mordaunt.* *Conyers* is ranked above *Monteagle*, and *Monteagle* above Lord *Vaux*. The consequence is, that this peerage must have been created subsequently to the 6th of *Henry* 8. Sir *Nicholas Vaux*, the father of *Thomas*, was a com-

moner in the 7th of *Henry* 8. That is proved by an indenture made between King *Henry* 8, on the one part, and Sir *Nicholas Vaux* and Sir *Thomas Parre*, on the other part, relating to the guardianship of *Elizabeth Cheyne*. There is a statement in *Dugdale*, and in *Stowe*, to which your Lordships' attention has already been called, that on the 27th of *April*, 15 *Henry* 8, three barons were created, so far as investiture went, by the King. Sir *Arthur Plantagenet* was created Viscount *Lisle*; Sir *Maurice Berkeley* was made Lord *Berkeley*, Sir *William Sandys*, Lord *Sandys*, and Sir *Nicholas Vaux*, Lord *Vaux*.

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The *Attorney-general*:—A statement in *Dugdale*, or *Stowe*, of a fact of that sort, is not evidence, and their Lordships have so decided (*l*).

Mr. *Lynch*:—I am not offering it as evidence, but it is impossible to go through this case without informing your Lordships how it has happened that *Nicholas Vaux*, who was a commoner in the 7th *Henry* 8, was styled in the inquisition after his death, *Nicholas*, Lord *Vaux*. It is a very important fact in corroboration of that statement, that, of the three barons so supposed to have been created, the two others were afterwards proved to have been created by writ. The letters patent creating the Viscount *Lisle* are enrolled upon the patent rolls. These rolls, as well as the signed bills and privy-seal bills, are perfect, and therefore we find these letters patent. The enrolment of the writs of summons, as well as the journals of the House, are imperfect, and therefore we cannot find the writs directed to the Lords *Berkeley*, *Sandys*, and *Vaux*. Your Lordships have, however, evidence that the peerage of *Berkeley* was created by writ; for it appears from the letter of *Fitzjames*, Chief

(*l*) *Ante*, p. 538.

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Baron, *Weston* and *Denys*, two of the Judges, proved in the *Berkeley* peerage case. The barony of *Sandys* has been decided to be a barony in fee tail. The first writ on record directed to Lord *Sandys*, is of the 21st of *Henry* 8; and although there are no journals in existence to show that Lord *Sandys* had not previously sat, yet he was in an Act of Parliament, 15th *Henry* 8, called Lord *Sandys*; and, according to a decision of this House, the barony of *Sandys* has been held to be a barony in fee tail. Under these circumstances, and with these precedents, I ask, on which side is the presumption to be? In favour of a patent, when not only the patent rolls, but the records of all letters leading to the passing of patents, are perfect, yet do not show a creation in that manner, and when creation of barons by patent was not usual? Or in favour of a writ, when the enrolment of writs of summons and the journals are most imperfect, and the creation by writ was the usual and ordinary mode of creation? In favour of a patent, when, according to the statement of the historian, four peerages were created, one a viscounty, and the other three baronies, and we have on the patent rolls the letters patent creating that viscounty (the usual method of creating such a peerage), and the patent rolls discover nothing respecting these baronies? Or in favour of a writ, when the enrolments of the summonses, if extant, would disclose the writs, and there is evidence of one of those three baronies having been created by writ, and there is a decision of your Lordships that another of them was so created?

My Lords, this barony of *Vaux* being a peerage created in the reign of *Henry* 8, I admit it is incumbent on me to satisfy your Lordships by negative evidence, that it was not created by patent; and accordingly we have given in evidence what appears

to me most satisfactory, upon that point. We have proved a search in every office or depository where it is possible that a patent, or the least possible trace of a patent, could be had. Mr. *Hardy*, chief clerk of the Tower, is asked: "Have you been directed to make search for a patent creating *Nicholas* or *Thomas Vaux*, Lord *Vaux*?—I have. Have you made that search?—I have. Have you found any trace of a patent?—Not the slightest." Mr. *Knyvett*, a clerk in the Secretary of State's office, is asked: "Have you been directed to make any search for a warrant for the purpose of a patent being passed to *Nicholas* or *Thomas Vaux*?—I have. Have you made that search?—I have. Have you been able to discover any such warrant?—No, the earliest books in the Secretary of State's office commence in the year 1674." Mr. *Holden* is asked: "Are there any warrants in the Rolls chapel?—Yes, the immediate warrants signed by the King. Have you searched them?—I have; I have searched both those and the privy seals. Do they exist for the period in question?—Yes, they do." Mr. *Jones*, record keeper, and receiver of fees in the Signet office, is asked: "Have you been directed to make any search for a patent for creating *Nicholas* or *Thomas Vaux*, Lord *Vaux*?—No, I have not been directed to make any search, but I attend to prove when the records commence. When do the records commence?—In the reign of *Elizabeth*; the earliest record in the office is in 1584." Mr. *Eden*, patent clerk, and keeper of the records in the Privy-seal office, is asked: "What is the earliest record you have in that office?—1751, in the reign of *Elizabeth*." Mr. *Jackson*, clerk of the Crown office in Chancery, is asked: "What is the earliest document you have in that office?—In the 37th of *Elizabeth*, a book commenc-

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ing in that year. Have you made any search for any earlier documents?—I have. Have you been able to find any?—I have not.” Mr. *Holden* again is asked: “Have you been directed to make search among the patent rolls for a patent creating *Nicholas* or *Thomas Vaux*, Lord *Vaux*?—I have. Have you made that search?—I have. Have you discovered any such patent?—I have not. From what period did you search?—From the 7th of *Henry* 8 to the 22d, both years inclusive. Have you any privy-seal letters in your office?—There are. Have you made search among them?—I have. Have you found any trace among them of a patent?—I have not. Have you searched every place in your office where it was likely you would find the trace of a patent?—I have; and I have not been able to discover any patent for the creation of either *Nicholas* or *Thomas* Lord *Vaux*: I have searched from the 7th of *Henry* 8 to the 21st. Are there any patents of that kind?—Yes; I met with several others, but not one for *Vaux*. Do the patent rolls appear perfect for that time?—Yes. Are they arranged in order of date?—They are. What is the office that you searched?—The Rolls Patent office, from the 7th to the 21st of *Henry* 8. Are there any patent rolls prior to that?—Yes, but I was directed to search from the 7th of *Henry* 8 to the 21st, the privy seals and patent rolls. And you have made that search, which enables you to say that if the patent had been there you should probably have discovered it?—Yes; I saw every document, and there was not one for the creation of Sir *Nicholas* or *Thomas Vaux*.” He is again asked: “Have you searched the privy seals, the signed bills, and the patent rolls, from the 21st to the 25th year of *Henry* 8, inclusive?—I have. Have you discovered any patent creating

Thomas Vaux Lord *Vaux*, or any trace of such a patent?—I have not; I have examined the privy seals, the signed bills, and the patent rolls: I looked at every document, several hundreds of them.” He again says: “I have searched the charter rolls of *Henry* 8, during the whole reign; I did not find any charter of creation of the barony of *Vaux*.”

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I have now shown your Lordships, from the Secretary of State’s office, the Privy Seal office, the Signet office, the Patent Rolls office, and the Record office in the Tower, that there is not the slightest trace of a patent. I have done that which was done by the Counsel, and which satisfied your Lordships, in the case of *Howard de Walden* and other cases. And although every office, in which any trace of a grant could exist, was carefully examined, the office of the Rolls contains every preliminary to, as well as the enrolment of, all patents creative of peerages in the time of *Henry* 8. It contains the signed bills, or the royal authority, the privy-seal bills resulting from them, which are the drafts for the patents, as well as the enrolments of the patents themselves. Mr. *Holden* stated that he had examined each of these documents, and that he could not find any trace of a patent creating the barony of *Vaux*.

My Lords, I proceed now to show why it is that I have not evidence of a writ of summons prior to the sitting of *Thomas* in the 25th of *Henry* 8; the first writ of summons produced as directed to him being in the 28th of *Henry* 8. There is evidence of the enrolments of the writs of summons of the 1st, the 3d, and the 6th years of *Henry* 8. These enrolments produced by Mr. *Holden* do not contain the name of *Nicholas* or *Thomas* Lord *Vaux*. From the 6th to the 25th of *Henry* 8, no journals of your Lord-

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ships' House exist, and no enrolments or other records of writs of summons are extant from the 6th to the 21st of *Henry* 8. The next document, therefore, which we are enabled to produce to your Lordships, is the parliamentary summons of the 21st; and Mr. *Holden*, who proved it, is asked: "Is that the writ of the 21st?—This is the summons of the 21st of *Henry* 8. Does the name of Lord *Vaux* appear in that writ?—No." Now, my Lords, *Nicholas Vaux* was a commoner in the 6th, and dead in the 21st *Henry* 8. By the inquisition given in evidence, it appears that he died on the 14th of *May*, in the 15th of *Henry* 8. Your Lordships may ask me how it happens that the name of *Thomas* Lord *Vaux* is not contained in the writ of summons of the 21st. The answer is, *Thomas* was then a minor. It appears by the inquisition that he was fourteen years of age in the 15th, consequently was not of age till the 22d of *Henry* 8, and therefore it is that his name does not occur in the summons of the 21st. In addition to the imperfection of the enrolments of the writs of summons from the 6th to the 21st, we suffer by the loss of the journals from the 6th to the 25th. The Parliament was called in the 21st of *Henry* 8; it sat by prorogation down to the 28th; the sitting in the 25th was by prorogation; and *Thomas* Lord *Vaux* came of age in the 22d. No special writs are ever entered upon the close rolls or other records; that is proved in this case, and was proved in the case of Lord *Howard de Walden*, wherein it is stated that the only instance to be found of any special writ, is that directed to Lord *Howard de Walden*. When, therefore, *Thomas* came of age, he sat, and of course he was specially summoned, and therefore it is that I am not enabled to give you that special summons; but he is found sit-

ting on the 27th of *January*, in the 25th *Henry* 8. This is the entry in the journals: “Present, *Dominus Vaux*; present, *Dominus Windesor*, *Dominus Wentworth*.” I have accounted to your Lordships why no prior writ of summons is produced. I have proved, as satisfactorily as was done in former cases, that there is no patent, that there is no trace of a patent: then why is an inference to be taken against me from the fact of *Thomas* Lord *Vaux* having sat in the 25th *Henry* 8? The imperfection of the records fully explains why it is that the prior writs are not forthcoming. I have proved that there is no patent, and yet the patent rolls are perfect. On that point, therefore, it is clear that there is no room for presumption or inference against the claim; and, indeed, it is fully admitted by the Attorney-general, that if *Thomas* had been included in the writ of 21st *Henry* 8, which no doubt he would have been, had he then been of age; or if the journals were lost from the 6th to the 28th *Henry* 8, instead of from the 6th to the 25th, no possible objection could be made against the claim.

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Thus our case stands independent of authority; I shall now state to your Lordships the authorities which support me. I will first refer to the case of the barony of *Strange*, which is printed in an additional case relating to the claim to the barony of *Braye*, which is upon your Lordships' table. I can read it from your Lordships' minute-book; it was a claim made by the Duke of *Athol*.

The *Attorney-general*:—I shall not object, if your Lordships make no objection, to my learned friend referring to a printed case.

The Earl of *Devon*:—There is no difficulty in referring to it, if it is founded on the statement of the

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minutes of the Committee of this House. Unless that which you state is from authentic documents, its being on the printed minutes does not make it evidence.

Mr. *Lynch* :—I believe I am entitled to read from your Lordships' minute-book, of which I have in my hand an authentic copy. Your Lordships will not take it upon mere assertion, because your Lordships will send for that minute-book, and I think you will find that my statement is correct. I merely take it from this paper as matter of convenience. "Mr. *Strange* was heard for the claimant (the Duke of *Athol*), and proposes to read an entry in the journal of this House of the 20th of *January* 1628, mentioning that *James Strange*, chevalier, was summoned to Parliament by writ, dated the 17th of *February*, 3d of *Charles* 1 ; which being objected to by the Counsel on behalf of the Crown, insisting that the writ itself should be produced, Mr. *Pynsent*, deputy clerk of the Crown, was called in and asked concerning the docket-book, or book of entries in his office, of writs of summons ; and thereupon acquainted the Committee that the book of the whole reign of King *James* 1, and of the first eighteen years of King *Charles* 1, was not to be found in the office, he having delivered several of these books to the late Lord Chancellor *King's* porter, by his Lordship's order, in *April* 1728 ; and though he has often made application for them, yet they have not been all returned, only four out of five. He was then asked as to the nature of them, and acquainted the Committee that they are abstracts of things passed the great seal. He is directed to cause the books to be brought at the next meeting, and in the mean time to make the

most strict search possible for the book that is missing. Mr. *Brown*, on the part of the Crown, desires the writ itself may be produced, or an account given why it is not to be found. The entry of the 20th of *January* 1628, afore-mentioned, read out of the journal. The Lord *Strange* mentioned, in the journal the 10th of *March* following, to be present, also the 13th of *April* 1640, and following days. Mr. *Russel* produces a copy of a writ of summons to the Lord *Strange* to a subsequent Parliament, out of the Petty Bag office, and the same was read. Mr. *Holmes*, deputy record keeper in the Tower, examined also upon oath as to what search he had made for a patent or grant whereby *James Stanley*, or any other person, was created Lord *Strange*; and he declared he had made the most strict search, but could find none. Mr. *Rook*, clerk of the chapel of the Rolls, also acquainted the Committee he had inspected carefully the books, &c. of the patent rolls of King *Charles* 1, but could find no entry of any grant or patent of a creation of Lord *Strange*. Mr. *Alexander Ross* produced to the Committee an authentic copy of an Act of Parliament of the 7th of *James* 1, part of the preamble read, reciting that *Ferdinando*, late Earl of *Derby*, left three daughters, *Anne*, *Frances*, and *Elizabeth*, and no son. The declaration made to the House the 7th of *June* 1628, by the then Lord President, that the King had granted his writ of summons to *James*, the son and heir-apparent of *William*, now Earl of *Derby*, by the name of *James Strange*, chevalier, and the same was read out of the journal." On a subsequent day, "Mr. *Pynsent*, again attending at the bar, is asked as to the docket-books of the writs of summons, and acquainted the Committee he had, since the last sitting, made diligent search for the

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book that is missing, and particularly in the study of the late Lord *King's* second son, who has all his father's books, but it is not there, nor is it, as he knows, any where to be found: he then delivered in at the bar the other books in his custody, having first read some few forms of entries, &c. Proposed to resolve that the petitioner, the Duke of *Athol*, had fully made out his pedigree from *James Lord Strange*, summoned to Parliament by writ in the 3d year of the reign of King *Charles*, the writ being directed *Jacobo Strange*, chevalier; and are of opinion that the said Duke has fully proved the allegations of his petition, and has made out his right to the barony of *Strange*, created by the said writ in the 3d year of the reign of the said King."

My Lords, in that case the writ was not produced. The journals were in existence, and they showed that Lord *Strange* produced his writ, but of the contents of that writ they afford no kind of evidence. And as it is as certain that a peer brought his writ, as that he took his seat, no kind of presumption can be drawn from an assertion in the journals that a peer produced his writ (no evidence of the contents of that writ being given), any more than from the fact of a peer being found seated in the House; for whether the journals say or do not say he produced his writ, still the writ must have been produced, or he could not have sat. The writ is delivered by the peer on taking his seat, to the Lord Chancellor. The writs of modern date are preserved, but none exist prior to the time of *James 1*, and the bundle for only one of his Parliaments is preserved. In the *Strange* case the Counsel for the Crown insisted upon the writ being produced, or an account given why it was not produced: that was the argument of the Counsel for the Crown on that occa-

sion, but the Committee determined that it was not necessary. I account for the writ not being produced in the present case; and why should Mr. *Mostyn* suffer in this case, when the Duke of *Athol* did not suffer in that case? I am unable to produce the writ to Sir *Nicholas Vaux*, because the records are imperfect, both the journals and the enrolments of the writs of summons, and I account in a very particular way why the writ, directed to *Thomas*, cannot be produced, for it must have been a special writ, as he came of age subsequent to the general writ of the 21st *Henry* 8, therefore this case is stronger than that of *Strange*, for I account for the non-production in consequence of the imperfection of the records; and I account also for it by showing that he was not of age till the 22d year of the reign, and that special writs are never entered on the close rolls or other records. The case of *Strange* is also most important in reference to an argument made by the Attorney-general, that if your Lordships cannot feel yourselves justified in presuming a patent, your Lordships possibly may be induced to presume an extraordinary writ, or rather an ordinary writ, with an extraordinary grant appended to it. He has referred to the case of *Bromflete* in the reign of *Henry* 6, the only instance of such a grant ever made in *England*. The *Strange* case entirely disposes of that argument, for the writ to Lord *Strange* was not produced, and yet the House did not feel itself entitled to draw any presumption from such non-production; still, if a presumption might be made, the probabilities in that case much more strongly favoured a special grant than in the present, for it would be more natural that the Crown and its legal advisers, in creating the new barony of *Strange*, should will and cause it to descend in the same line

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as the earldom of *Derby*, possessed by the father of the new peer, namely, to the heirs male. Such was the course pursued when the present Earl of *Derby* was created Lord *Stanley*; such was the course pursued in the creation of the present Lord *Duncannon*, and on several other occasions. Still the House of Lords decided that the writ to Lord *Strange*, of the contents of which no evidence was given, must be held to have been an ordinary and usual writ.

The case of *Wentworth* appears to me identical with the present. The following is taken from the minute-book of your Lordships' House: "*Barony of Wentworth*. Sir *Thomas Powis* opens the case for the petitioner, the wife of Sir *Henry Johnson*. She is the lineal heir to Lord *Wentworth*, in the 21st year of *Henry 8*. He cites the pedigree as in the printed case. We are the daughter and heir of that family, lineally descended; this hath not been in abeyance: this lady is the single person. Sir *Thomas* appeals to the journals; he is entered in the journals 25th and 28th *Henry 8*. Lord *Wentworth* was present, as appears by the journals, and so the several days after. They produce the records of the Petty Bag to show the writs of summons 30th *Henry 8*; they read Lord *Wentworth's* summons to Parliament; they read summons of the 1st and 6th *Edward 6* and 15 *Charles 1*. The Earl *Cleveland* is summoned, and his son brought into Parliament, and so admitted. They produce the heralds' books. Sir *Henry St. George* says: This book hath been in my office ever since his time, and looked upon to be very good. Mr. *Grimes*, junior: I have searched the rolls, and find no patent at all. I never knew any writs filed in our office. Mr. *Attorney-general* heard: says, I am satisfied; I cannot controvert, but if he was called by writ, it creates

a barony in fee. Ordered and adjudged that the claim to the barony of *Wentworth* be allowed." My Lords, Lord *Wentworth* is found sitting in the 25th of *Henry* 8, the very year in which Lord *Vaux* is found sitting. Lord *Wentworth*'s name does not appear in the general writ of summons in the 21st of *Henry* 8; he is not summoned to Parliament by that writ; there was not, and could not be, any evidence of any writ of summons directed to Lord *Wentworth* prior to his sitting in the 25th of *Henry* 8. The first writ of summons produced is in the 30th of *Henry* 8. My Lords, would not the same objection have lain in that case as is now tendered by the Attorney-general; but if it were made, it was not then adopted by the House as an objection to that peerage being held descendible to heirs general. The House was of opinion that, from Lord *Wentworth* sitting in the 25th of *Henry* 8, although no writ of summons was produced prior to that of the 30th of *Henry* 8, no presumption could be raised that the barony of *Wentworth* was created otherwise than by the usual writ of summons, and sitting, and therefore it was ruled that it went to the heirs general. My learned friend, with all his ingenuity, cannot draw a distinction between these two cases. They are identical as to circumstances and as to time; and, therefore, I rely upon this case of *Wentworth* as an authority, not only that your Lordships cannot presume a patent in the case of *Vaux*, but that you can presume no other writ than an ordinary writ of summons directed to Lord *Vaux*, such as was held by this House to have been directed to Lord *Wentworth*. Let the two cases be put in juxta-position. The Parliament of the 25th of *Henry* 8 met by prorogation, having been called in the 21st. The parliamentary pawn of that year is in evidence

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before your Lordships. The names of *Vaux* and *Wentworth* do not appear in that year. The journals of the House are missing from the 9th to the 25th of *Henry 8.* The Lords *Vaux* and *Wentworth* are both found sitting in the 25th. It does not appear that such sittings were their first. They must have taken their seats some time between the 21st and 25th. If the journals were forthcoming, the circumstance under which they had taken their seats would have been explained by the journals themselves; but as far as respects Lord *Vaux*, I have explained to your Lordships why he was not comprised in the general writ of the 21st *Henry 8.* not attaining his age until the 22d *Henry 8.* In that year he must have been specially summoned, and have taken his seat; and special writs are not entered on the close rolls or other records. In the case of Lord *Wentworth*, there is no trace that he or any of his ancestors were peers before the 21st of *Henry 8.* After the Parliament of that year was assembled, the Lord *Wentworth* was specially summoned. His special writ is not, for the same reason, to be found amongst the records. Your Lordships have decided that the barony of *Wentworth* is a barony in fee tail, descendible to heirs general. Can your Lordships say that the barony of *Vaux* is not, in like manner, a barony in fee tail, descendible to heirs general? We have the facts of the *Wentworth* case from your Lordships' minute-book, your Lordships' own record, the best evidence the thing is capable of. I know of no case where error has been discovered in those minute-books. But in the *Wentworth* case every assertion contained in the minute-book is fully confirmed by your Lordships' journals, the close rolls and the parliamentary pawns. Can your Lordship have clearer or better evidence?

My learned friend has endeavoured to induce your Lordships to believe that the writ issued to Lord *Vaux* was an extraordinary writ, or, to speak more correctly, an ordinary writ with an extraordinary grant attached to it. His argument is a very extraordinary one, and the extraordinary nature of it consists in this, that, because in the reign of *Henry 6*, a time in which the utmost confusion existed as to the creation of dignities, and as to the laws affecting them, there is a single instance of a writ, with an extraordinary grant attached to it, limiting the descent of the peerage to the heirs male, the single instance of such a writ is sufficient to induce your Lordships to infer that such a grant might have been appended to the writ issued to Lord *Vaux*; that is, that your Lordships are to presume that which was unusual, extraordinary, and unique, in preference to inferring that which was usual and ordinary at that time. The Attorney-general referred also to three Irish cases, in the reign of King *James 2*, after he had lost his English throne. My learned friend is unlucky as to the periods of his alleged precedents; *Henry 6* in *England*, and *James 2* in *Ireland*. I admit *James* was then King of *Ireland*, and had full power to ennoble, and that the persons named in those writs were ennobled; but I submit that they were ennobled by the grants appended to the writs, and not by the writs themselves. Let us examine the peculiar nature of the writs. They are not writs properly so called, but writs with grants attached to them, partaking of the character of both a writ and a grant. In *Ireland* these grants were probably deemed essential, for there is no evidence that a peerage was ever created by writ in that country, and the current of authorities, as well as the descent of dignities there, prove that the ancient

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peerages of that kingdom did not originate in writs of summons. *James's* ministers had no time to prepare patents, and the grants attached to these writs were, no doubt, framed with a view of doing that which, in ordinary circumstances, would have been done by letters patent. Accordingly, as the writ and grant directed to *Bromflete*, in the time of *Henry 6*, are entered with other grants upon the close roll, so we find, on the other hand, the three Irish writs and grants entered on the patent rolls. The case of the barony of *Slane* (*j*) and other ancient baronies of Ireland, have been mentioned by the Attorney-general; but, although the noble and learned Lord who pronounced your Lordships' decision in the *Slane* case alluded to the possibility of a lost patent, or of a writ similar to that directed to *Bromflete*, still it was on the strong and uniform usage of the male succession, and the exclusion of females, that his Lordship decided that claim. That decision was in strict conformity with the doctrine laid down in the Reports made by your Lordships upon the dignity of the peerage. In the third Report, p. 57, your Lordships say, "A title to an inheritance in a dignity may have been originally acquired by creation, and the existence of such a title by creation may be proved by the fact of enjoyment by descent, when the fact of original creation cannot be ascertained." I beg the attention of your Lordships to the striking contrast which the male descent of the ancient baronies of *Ireland* presents with the succession to the ancient *English* baronies; for, if the former proves that females were incapable of succession, so does the latter show that the male line could not long enjoy an *English* barony. Accordingly, there is not a single *English* barony

(*j*) *Ante*, p. 23.

created by writ now vested in the family of the person first summoned. Before the time of *Richard 2*, no barony was created in *England* except by writ; Lord *Stourton* is the only baron now sitting who derives his dignity from a patent granted before the time of *Edward 6*. Amongst all the ancient barons of *England*, there are but two existing who derive their baronies from patents granted before the time of *Elizabeth*; all the rest owe their baronies to writ. Is not the usage, then, in opposition to the argument of the Attorney-general, and in conformity with the claim I have the honour of advocating? There is no reason, I do confidently submit, for such an extraordinary presumption as that which the Attorney-general calls upon the House to make, viz the presumption that an extraordinary writ, that is, a writ and grant, did issue to Lord *Vaux*. The same argument might have been urged in almost every claim ever made to a barony by writ, as no evidence was ever required or tendered that the writ produced was the first writ issued; and especially it might have been urged in the case of the *Strange* and *Wentworth* baronies. There was just as much ground for that extraordinary argument in those cases as there is in this; but your Lordships did not hear it, or, if you heard it, you disregarded it; and accordingly the claim of Lady *Johnson* was allowed, claiming as heir general to Lord *Wentworth*, who was not summoned in the 21st of *Henry 8*, but who appears to have sat in Parliament in the 25th, the first summons produced being in the 30th of *Henry 8*. I do submit that the case of *Wentworth* directly governs this case, and that the barony of *Vaux* must be considered the case of a barony created by a writ of summons, and sitting, and therefore descendible to the heirs general.

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My Lords, I hope I have satisfactorily shown to your Lordships that this barony, in the first instance, descended to the heirs male, who were also heirs general; that it fell into abeyance upon the death of *Henry Lord Vaux*, between *Elizabeth*, Lady *Mountgarret*, who was the daughter of *Mary Vaux*, by Sir *George Simeon*, and the Lord *Abergavenny*, the son of *Catherine Vaux*. If I am asked, Why was not this claim made before? I refer, in the first place, to the state of the law down to the year 1693; in the next place, the Lords *Abergavenny*, the junior coheirs, had their own *English* title; and *Elizabeth*, the elder coheir, married Lord *Mountgarret*, a Roman-catholic nobleman, who was in the enjoyment of an *Irish* title, and whose descendants profess the Catholic religion down to the present day. Your Lordships are aware that until 1829 the abeyance of a barony could not be determined in favour of a Catholic; for the way in which an abeyance is determined is by the King issuing his writ, directing the party to take his seat in this House; and unless he takes his seat he is no peer, and the abeyance is not determined. I thus account for a prior claim not having been made, and show very satisfactory reasons to your Lordships why we bring forward our petition at this late period. Non-user has never been considered a sufficient objection to a claim of right. Having shown that this must be a barony created by writ of summons, descendible to heirs general, and how it fell into abeyance; having traced the pedigree of Mr. *Mostyn* from the eldest of the coheiresses, *Mary*, I trust that your Lordships will be of opinion that Mr. *Mostyn* has made out a claim to be entitled as one of the coheirs to this barony.

Sir *Harris Nicolas*, for Mr. *Hartopp* :—The course of descent of dignities at the common law is to heirs general; and until the reign of King *Edward 2* there was no instance of any dignity whatever being granted, except to heirs general. At that time all baronies were created by writs of summons, followed by sittings in Parliament; and the first time when the Crown controlled the descent of baronies by letters patent was in the reign of King *Richard 2*, in 1387. There was not, however, a succession in that instance; and no other patent of a barony was issued until the reign of King *Henry 6*, in 1431. From that time to the latter part of the reign of King *Charles 2*, baronies were sometimes created by writ, and at other times by patent; but from the time of *Richard 2*, when patents of baronies were first introduced, to the reign of *Henry 8*, when the barony of *Vaux* was created, the usage was to create them by writ. The law with respect to ancient baronies, therefore, is that, until a patent be produced, it must be presumed that the dignity originated in a writ of summons, because such was the general usage. That principle, long acted upon, was solemnly recognized by this House, after a reference to the Judges, in the case of the *Clifton* barony, in 1673. Since that time the following cases have been decided: the baronies of *Windsor*, *Fitzwalter*, and *Ros*, in the time of *Charles 2*; of *Clifford*, *Clifford of Lanesborough*, *Howard de Walden*, and *Willoughby de Broke*, in the time of *William and Mary*; *Wentworth*, in the time of *Queen Anne*; *Berners*, in the time of *George 1*; *Clifford of Burlington*, in the time of *George 2*; and the baronies of *Beaumont*, *Botetourt*, *Clinton*, *Conyers*, *Hastings*, *Howard de Walden*, *Ros*, *Say and Sele*,

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Strange, Willoughby d'Eresby, and Zouch, in the time of *George 3*. These repeated decisions have settled the rule of law that, if a barony can be shown to have existed, and if no patent can be found, such barony must be considered to have descended to the heirs general of the body of the first peer found sitting in this House by the records of Parliament. It is, therefore, necessary, in order to establish a claim to a barony under that rule, to produce evidence, first, that there is no patent; secondly, that the claimant's ancestors were summoned to, and sat in Parliament, as barons of the realm.

The evidence of the non-existence of a patent must, from its nature, be negative. It must be shown that no patent is enrolled, and that after the most diligent search no trace of one can be found. Patents are enrolled, not for the benefit of the subject, but for the protection of the Crown, in order, that when anything is claimed from the Crown, it may know what it has parted with; and as those records form the only register of grants, I submit, that if a diligent search has been made, and no patent found, it is sufficient proof, at least against the Crown, that none was ever issued. In all previous cases the House has been satisfied of the non-existence of a patent, simply by the parties proving, by the proper officer, that there was no record of it on the rolls; but in this case, as well as in that of the barony of *Braye*, which is also before your Lordships, there is no source, which affords a possibility of finding it, which has not been diligently searched. In fact, the same pains have been taken to ascertain that there is no patent, that would have been taken if our title had depended on producing a patent.

The evidence which has been adduced to show that there is no patent of this barony is, first, the evidence of Mr. *Hardy*, chief clerk in the Tower, that the patent rolls in that repository end in the reign of *Edward* 4, and that the privy-seal bills end in the reign of *Richard* 3; next, the evidence of Mr. *Holden*, clerk in the Rolls' chapel, that he had searched the patent and charter rolls in the Rolls' chapel, and the privy-seal bills and warrants which are preserved from the 1st to the 28th of *Henry* 8, and the close rolls to the 15th of *Henry* 8; and he added, "that he must have discovered the patent if one had ever been issued." We have then the evidence of Mr. *Adlington*, who states that he has searched the wardrobe account books in the Augmentation office, which were examined, because an annuity was usually attached to a dignity, when created by patent, for its support; and some record of the payment would probably be found in these accounts, if this barony had originated in a patent. There is then the evidence of Mr. *Panton*, a clerk in the Pipe office; of Mr. *Knyvett*, from the Secretary of State's office; of Mr. *Jones*, from the Signet office; of Mr. *Eden*, from the Privy Seal-office; and of Mr. *Jackson*, from the Crown office, who all state that there is no trace of a patent among their records; and these are the only offices through which the preliminary proceedings for issuing a patent could have passed (*k*).

The Attorney-general has suggested, that notwithstanding this evidence, a patent may yet be presumed, and more especially, because the first writ to Lord *Vaux* has not been produced. With respect to dignities which could only have existed by letters patent, and which were found by the records of Parliament to have been

(*k*) See their evidence, 537-8, and 549-50.

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enjoyed, you are obliged to presume a patent, because such dignities could not possibly have existed without one; and it therefore depends upon the nature of the dignity whether a patent is or is not to be presumed. When you find that an hereditament has been enjoyed for a long series of years, you are obliged to presume the necessary instrument for clothing the party in possession with a legal title. *Bedle v. Beard* (l), *Mayor of Hull v. Horner* (m), *Read v. Brookman* (n), *Keene v. Deardon* (o), *Johnson v. Ireland* (p), *Blackstone's Commentaries* (q), *Phillipps on Evidence* (r). In the case of the *Mayor of Hull v. Horner*, Lord *Mansfield*, adverting to presumptions, says (s), that the reason why the patent of the Viscounty of *Purbeck* (the only proper evidence of that title), was presumed was, because there could be no doubt that it had existed and been enjoyed by a peer sitting in this House in that dignity, and he had levied a fine of his honour to the Crown: but I submit that the case of baronies is totally different, because they can be created without a patent; and at the time in question they were not only sometimes so created, but it was the general usage to create them without a patent. From the 11th of *Richard 2* (1387), when the first baron by patent was created, to the 25th of *Henry 8* (1532), fifteen baronies were created by patent, and thirty-seven by writ. Between the 1st and 25th of *Henry 8* (the period within which the baronies of *Vaux* and *Braye* were created), fifteen baronies were created, of which number only one was created by patent, whilst fourteen

(l) 12 Co. Rep. 5.
 (m) 1 Cowp. 102.
 (n) 3 T. Rep. 151. 158.
 (o) 8 East, 248. 263.

(p) 11 East, 280.
 (q) 3 Vol. 371.
 (r) 1 Vol. 155.
 (s) Cowp. 109.

were created by writ. Since the year 1532 only sixteen baronies have been created by writ; so that from that time to the present the general usage has been to create baronies by patent; but up to the 25th *Henry* 8, the ancient usage was still continued, of creating them by writ. The House has decided over and over again that evidence of non-enrolment is the proper legal proof of the non-existence of a patent of a barony. This evidence may be rebutted by the production of a patent, and perhaps also by showing that preliminary measures were taken for issuing a patent; but until evidence of that description be adduced, I submit that the evidence of non-enrolment is of itself conclusive. In this case we have followed it up by searching every record office, and by using the utmost diligence to find a patent, or the trace of a patent, without the slightest clue to its existence; and it is a very important fact, that though the parliamentary records of this period are extremely imperfect, the patent and charter rolls appear to be perfect and complete. In no case of baronies has the House ever presumed a patent. To presume a patent would, in effect, extinguish baronies by writ. To presume a patent of a barony where no trace of one can be found, is to destroy the vested rights of inheritance, which all the descendants of barons by writ have in those dignities; for under the law, as it has long stood, any person who may happen to be the sole heir of the body of a baron, for whose barony no patent can be found, has an absolute right to the dignity of the peerage;—a right as absolute and indefeasible as the right of any peer under letters patent. Those rights it is the bounden duty of your Lordships, and of every court of law, to protect. It is an important fact, that in no one instance in which the House has been satis-

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fied by evidence of the non-enrolment of a patent that there was no patent, has any patent ever been since found. If the House had ever made a mistake, in being satisfied with evidence of non-enrolment, it might be expected that the numerous investigations which have taken place among the public records since those decisions, would have brought some of the patents to light, or at least that a trace of them would have been found if they had ever existed ; and the fact that none has been discovered, proves that the House acted correctly, in concluding that there was no patent, upon evidence being given that none was enrolled.

The Attorney-general has said, if your Lordships are to presume a writ, why not presume a patent? The answer is, because the writ must have issued; and because, in this case, not only is there no necessity for a patent, but it is contrary to the general usage that there should have been a patent. No baron, whether created by patent, or without patent, could take his seat in this House without producing his writ; and as the writ in the case of baronies would sufficiently account for the existence of the dignity, it is only necessary to presume the writ—to presume that which must, *ex necessitate rei*, have issued, and the title is complete. It has been conceded by the Attorney-general that you must presume a writ. Then our case is established : for it has been proved that there is no patent : it is admitted that you must presume a writ ; it has been proved that the Lords *Vaux* did repeatedly sit in Parliament, as barons ; and this evidence is fully sufficient to prove the existence of a barony to the first Lord *Vaux*, and the heirs of his body. The doctrine of presumptions goes no farther than this—You are to

presume that which is absolutely necessary for the existence and perfection of the right in question (s). By presuming a writ in this case you do presume that which is necessary for the existence and perfection of the thing; but it has never been said that you are to presume two things, when only one is sufficient; more especially when the second thing was not only unnecessary for the existence or perfection of the right, but when it would be contrary to the general usage that it should have existed. The only ground on which a patent can be presumed in the case of a barony is, when the descent and enjoyment have been adverse to the rights of the heirs general; when you find that an heir male had been summoned repeatedly, and had enjoyed the dignity, and that the heirs general had been passed over. In such a case there would be some reason to suppose that the dignity had been originally limited to heirs male. This occurred in the *Slane* case (t), the only instance which the research of the Attorney-general has discovered, in which the House has admitted the possibility of there being a patent of a barony when no patent could be found. But even in that case, I take the liberty of saying, that I am not satisfied of the soundness of the principle upon which it was decided that the claimant had not made out his right. The heir male, however, in urging his claim, may be told the same thing. He has not yet proved his right; and until he has been admitted to the dignity by your Lordships, upon the principle of presuming a patent of the barony of *Slane*, I am entitled to say, that the House has in no instance whatever presumed a patent of a barony. The argument of the Attorney-general against being satisfied from the evidence of the non-

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(s) 12 Co. Rep. 5.

(t) *Ante*, p. 23.

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enrolment of the patent, that no patent existed, was founded on a case in the time of *Charles 2*, in which a patent had not been enrolled, the patent of the Dukedom of *Richmond*. This, if it be so, is only a solitary exception to the rule, and cannot affect this case.

But in the *Richmond* case there was some evidence of a patent; because not only must a patent have issued to create a Dukedom, but your Lordships' journals state that when the Duke of *Richmond* took his seat, he "delivered his patent and his writ on his knee." I therefore submit, with respect to a patent, that the principle of law which I have stated, the care which the Crown always took to enrol its grants, and the precedents adopted by your Lordships in the numerous cases to which I have alluded, prove that a patent of the barony of *Vaux* cannot be presumed; and I trust that the evidence has completely satisfied your Lordships that there never was a patent of that dignity.

The creation of the barony must therefore be traced to another source. We have shown the existence of it by the only record which can properly be adduced for that purpose,—the records of Parliament. "Baron or no baron," says Lord *Coke*, in the *Abergavenny* case (*u*), "must be proved by the records of Parliament;" and by these records we have satisfactorily shown the existence of this barony in the 25th of *Henry 8*. It has been proved (*v*) that the original writs of summons, from the 7th to the 25th of that King's reign, are lost; that there are chasms in the enrolments of the writs at that period; that it was not the practice to enrol writs sealed after the general issue of writs for summoning a Parliament; that it was not the general custom then to enrol writs

(*u*) 12 Rep. 70.

(*v*) *Ante*, p. 535-6.

of summons; and that it ceased altogether in the reign of *Philip* and *Mary*. The precise date therefore of the origin of this barony cannot be shown by legal evidence. But it is shown by evidence that there was no such barony as that of *Vaux* in or before the 7th of *Henry* 8, when the journals of this House are preserved; and that it did exist in the 25th of *Henry* 8, which is the first year after the 7th, for which the journals are now extant. We have shown also that *Nicholas*, the first Lord *Vaux*, did not style himself a peer in the 7th of *Henry* 8; that he did style himself a peer in his will in the 25th, shortly before his decease; that he was so styled by the Crown in the writ for taking an inquisition after his decease, as well as in the inquisition itself; that he was also so described in an Act of Parliament; and that his son and his descendants always enjoyed a precedence in this House which could only belong to a creation between the 7th and 21st of *Henry* 8, because they always sat above barons who were created in the 21st year of that King. It was said by the Attorney-general that the title "Lord" is no evidence of peerage; that the word "*Dominus*" was applied in early periods to graduates of the Universities; and that Lord *Hale* and Lord *Coke* were styled "Lords." That is true; but it is different from finding that, in the 7th of *Henry* 8, Sir *Nicholas Vaux* styled himself "Sir *Nicholas Vaux*, Knight," and in the 15th, "Sir *Nicholas Vaux*, Knight, Lord *Harrowden*;" that the Crown in the writ for the inquisition styled him "*Nicholas Vaux*, Miles, *nuper Dominus Vaux*;" and that the escheator in the inquisition styled him "*Nicholas Vaux*, Miles, *Dominus Harrowden*." Moreover, in an Act of Parliament for settling some lands, passed in favour of his son *Thomas*, second

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Lord *Vaux*, in the 27th of *Henry* 8, his father is styled “Sir *Nicholas Vaux*, Knight, late Lord *Harrowden*, father of Sir *Thomas Vaux*, Knight, now Lord *Harrowden*,” which *Thomas* Lord *Vaux* was the person whose enjoyment of the honour has been proved by evidence of his having sat in this House; so that precisely the same style is attributed to the father as was attributed to the son, and whatever legal doubt may exist of the father being a peer, no doubt can exist of the son’s having been a peer.

It has been shown by evidence that the barony of *Vaux* was created between the 7th and 25th of *Henry* 8, and I have raised a strong presumption that it was created in the 15th, by the precedence which the Lords *Vaux* enjoyed. It was objected by the Attorney-general that prior to the statute of the 31st of *Henry* 8, for regulating the precedence of peers, there was great irregularity on the subject, and that no inference can be drawn from their precedence. Without inquiring into the soundness of that proposition, I answer it conclusively, by stating, that after the 31st of *Henry* 8, when precedence was particularly the subject of attention in this House, the Lords *Vaux* sat in precisely the same place as they did in the 25th of *Henry* 8. It is stated by the chronicler *Stowe*, repeated by Sir *William Dugdale*, and corroborated by a singular series of facts, in evidence, that *Nicholas* Lord *Vaux* was created in the 15th of *Henry* 8.—

The *Attorney-general* objected to the statements of chroniclers being cited as authorities, as he had before objected to Mr. *Lynch*’s reference to them.

Sir *Harris Nicolas* :—I submit that the statement by a chronicler of the creation of peers, at a period

when peers were not made by dozens, but when it was rather an extraordinary event, may be read in support of a fact which has been proved by evidence.

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The *Attorney-general* :—My learned friend is adducing it as substantial evidence. It is my duty to oppose it.

The *Lord Chancellor* :—A statement of this matter in an old manuscript was tendered, and rejected. Is this preferable to what was rejected ?

Sir *Harris Nicolas* :—Your Lordships have always permitted Counsel to advert to statements of historians. I am not stating it as legal proof.

Lord *Lyndhurst* :—All you can do is to prove your case, and then say, it is singular that *Stowe* has stated so and so ; we may admit it not as evidence, but as a singular coincidence.

Sir *Harris Nicolas* :—It is, my Lord, a very remarkable coincidence. The creation of Sir *Arthur Plantagenet* to the Viscounty of *Lisle* is proved by letters patent, entered on the rolls on the very day assigned to his creation by *Stowe* and *Dugdale* ; but there are no letters patent for either of the other three peers mentioned, Lord *Berkeley*, Lord *Sandys*, and Lord *Vaux*, who were created on that occasion. Lord *de Lisle* being a Viscount, was created by patent, and that patent is on record. Lord *Berkeley* was created by writ, and a letter to him is still extant, from the Lord Chief Baron *Fitz-James*, *Richard Weston*, Baron of the Exchequer, and *William Denys*, who appears to have been Lord *Berkeley's* Counsel,

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and which has been put in evidence in the *Berkeley* case; in which, in reply to Lord *Berkeley's* objection to accept of the honour, because he thought he was entitled to one of greater ancientcy, the Lord Chief Baron *Fitz-James*, and the other learned persons, advised him to take the dignity. There cannot be a doubt that, if the parliamentary records were perfect, the origin of Lord *Vaux's* and of Lord *Sandys's* title could be as well proved. The barony of *Sandys* has been allowed by this House to the heir general, as a barony by writ. Is there, then, the slightest reason for supposing that the barony of *Vaux* was created in a different manner from the baronies of *Sandys* and *Berkeley*?

The barony of *Vaux* only differs from the twenty-two cases which I before cited in this fact—that the *first* writ of summons is not preserved. I have shown the utter impossibility of producing the first writ, in consequence of the loss of the parliamentary records of the period. It has been admitted by the Attorney-general that a writ must be presumed, inasmuch as no peer could have sat in this House unless he had produced his writ of summons. But he also said that, because the first writ is not preserved, it is possible to presume that it contained a limitation to the heirs male of the body of the person to whom it was addressed. I submit, that as the writ does not create the dignity, as it is not kept by the individual on whom the Crown confers the peerage, but is delivered up to the Lord Chancellor, who places it among the records of Parliament, neither the party himself nor his heirs are bound to produce it as evidence of his right to the peerage. He could not possibly produce it from his own archives: if he could, it would be *prima facie* evidence that he had not sat in the House, because,

before he takes his seat he delivers the writ to the Chancellor, and it is never returned to him. With respect to letters patent, when the title of a peer who was created by letters patent is impeached, he produces the letters patent, and says, "Here are my title deeds." They are given to him for that purpose, and he has only to exhibit them to satisfy the world of his right. In the case of a barony by patent, and of all higher honours, the peer approaches the table of the House with his writ of summons in one hand, and his patent in the other. The Chancellor takes the writ from him as his authority, if I may so express myself, for admitting the new peer into this House. The patent gives him no absolute right to come here, unless he be duly summoned to attend; for until he is called upon to perform the functions of a peer by a writ from the Crown, he cannot enter this House. The writ is the King's command to attend his Majesty in Parliament. When he obeys that command for the first time, if the dignity be created by letters patent, the patent is read at your Lordships' table, to show the origin and nature of the dignity, and it is returned to the peer as evidence of his title to his peerage. But the writ is taken from him by the Chancellor, to be deposited among the records of the House.

With regard to presuming a limitation to heirs male, in the first writ to Lord *Vaur*, I take it to be a first principle of law, that if any doubt arises as to the words in which that instrument was couched, you are to presume that it was in the usual terms in which every other writ of the same kind upon record (with one exception) was worded, unless some reason be given why you are to suppose the contrary. From the year 1264 to the year 1836, there is but one instance of the Crown

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having inserted such a clause of limitation in a writ of summons. Is there any pretence for saying, that in the single instance of Lord *Vaux* you are to suppose that the Crown, for the second time in the whole period of our history, issued a writ different from the usual form? In the only instance, in which the limitation occurred, the barony of *Bromflete de Vessy*, or rather of *Vescie*, the general writs of summons to Parliament in the 27th of *Henry 6* had been made up; but a few weeks afterwards a special writ was issued to Sir *John Bromflete*, containing the usual command to attend Parliament, in the usual form, except this addition, “*Volumus enim vos et hæredes vestros masculos de corpore vestro legitime exeuntes Barones de Vescie existere (x).*” Before I inquire whether this addition could have any legal operation, I beg to state that there was no inheritance under this writ by the heir male, and that there is no instance of the heir male of any peer having ever inherited a dignity under a limitation in a writ of summons. Lord *Vescie* died, leaving no other child than one daughter, who married Lord *Clifford*; and notwithstanding the clause in the writ, attempting to limit the dignity to heirs male, all her descendants styled themselves Lords *Vescie*; but as they possessed a title of older creation, they had no motive for establishing their right to sit in Parliament as Barons *Vescie*. But as to the main question, Can the Crown grant or limit a dignity by a writ of summons? I contend that the grant or limitation of a dignity by writ is void, and that the Crown can only grant by letters patent or by charter; for there never was an instance of a grant by the Crown, whether of honours, lands, or offices (except

(x) Rep. on the Dignity of a Peer, App. 919.

that of the Chief Justice of the King's Bench), by any other instrument than by letters patent or by charter. The reason why the King can only exercise his prerogative in that way is stated by Blackstone (y), "In order that the same (the King's grants) may be narrowly inspected by his officers, who will inform him if anything contained therein be improper or unlawful to be granted. These grants, whether of lands, honours, liberties, franchises, or aught besides, are contained in charters or letters patent," &c. It cannot be pretended that the King could grant an estate of lands by writ; and if he cannot, it would be inconsistent with the dignity of the peerage to suppose that, though the King cannot grant an acre of land, except by the most important instrument known to the constitution, yet his Majesty can create a peer in a less solemn manner. A writ of summons to Parliament is simply the King's command to a person to perform a particular duty. It grants nothing; it creates nothing; it cannot therefore ennoble. In the *Abergavenny* case (z), where the writ of summons had issued, but the party died before he could obey it, the decision of all the Judges was, that a person summoned to Parliament is not a peer until he obeys the writ. The peerage under a writ is consequently obtained, not by the writ, but by sitting in this House; and so high is the dignity of the peerage, that the common law will not permit a man to be a peer to-day and not a peer to-morrow; but being a peer (in conformity with the rule of the common law, that when an estate is granted it goes to the heirs of the grantee, unless specially restrained by the grant), he obtains an estate of inheritance of the most exten-

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(y) 2 Vol. 345.

(z) 12 Co. Rep. 70.

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sive nature known to the law which regulates the descent of dignities. I mean from this analogy to show why a right of inheritance, in its largest form, is incidental to peers sitting in this House, whenever the descent of the honour is uncontrolled by letters patent; or when, as in the case of the Bishops, its enjoyment is not governed by prescription. The writ is no part of the title of the individual, who claims a peerage; but the proof of his title as a Baron, when there is no patent, is in the journals of this House. For this reason, if a Baron, whose title originated in a writ of summons, had to plead his peerage in the Court of King's Bench, and there was a doubt whether he was a peer or not a peer, his writ, even if he could produce it, would be no evidence of the fact; but his proof of peerage, if there was no patent of creation, would be by the journals of this House, which are the records of Parliament.

It is said by Lord *Coke*, in the first Institute (*a*), where he is speaking incidentally of exceptions to the rule that the word "heirs" is necessary to create an estate of inheritance: "Nor to a creation of nobility by writ; for when a man is called to the upper House of Parliament by writ, he is a Baron, and hath inheritance therein without the word heirs; yet may the King limit the general state of inheritance created by the law and custom of the realm to the heirs males or general, of his body, by the writ, as he did to *Bromflete*, who in 27th *Henry* 6, was called to Parliament by the name of the Lord *Vescie*, &c., with the limitation in the writ to him and the heirs males of his body." When Lord *Coke* wrote that paragraph, he had not given the same attention to the nature of dignities

(*a*) Co. Litt. 9^b.

as he had done in other parts of his works: for from this passage it must be inferred, that he was of opinion that the writ itself could ennoble, whereas, in another part of his works, he states that the writ itself has no such effect.—*Abergavenny* case (b).

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Lord *Redesdale*, who was more conversant with the mode of creating peers, and more learned on that subject than any person whom this country has produced, observes, in the first Peerage Report (c), speaking of the first patent to a Baron in 1387: "This grant by patent had the effect of ensuring succession to the dignity according to the terms of the patent, and to confine the title to such heirs as were specified in the patent. From this time, however, it may be considered that the descendants of all those who were then peers, and not so created by letters patent, might claim the dignity by prescription, if summoned by a general writ; and the apprehension that such would be the effect of a general writ may have led, in another case, that of the Baron *Vescie*, to a specification in the writ of summons of the special heirs to whom it was the King's intention that the dignity should descend."

The simple addition to the writ to Lord *Vescie*, was a mere declaration of the King's pleasure, that Sir *John Bromflete* and the heirs male of his body should be Barons *Vescie*. It is nothing more than an intimation of the King's design. There is no grant: nor is there one of the words necessary to constitute a grant, even if they had occurred in letters patent; for there is neither a "*concessimus*" nor a "*habendum*." Suppose that Lord *Vescie* had died without obeying the writ, and had left a son, can it be said that this

(b) 12 Rep. 70.

(c) P. 342.

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declaration of the King's pleasure in a writ of summons to his father—which is not the proper instrument for making a grant of any kind, and the words in which are not the proper ones to constitute a grant, even in letters patent—could create a peerage in tail male? Can it be pretended that a declaration of the Royal pleasure in a letter from the King to an individual, commanding him to perform certain services, is tantamount to a grant by charter or letters patent, and a grant too of the dignity of a peer of the realm? I press the impossibility of the Crown to create or limit a dignity by a writ of summons; because if I show that it was impossible for the Crown to do so, then I destroy the effect of the hypothesis that the first writ to Lord *Vaux* might have contained a limitation to the heirs male of his body.

An instance exists of a grant of an office by writ, in the case of the Lord Chief Justice of the King's Bench. The writ to the late Lord *Ellenborough* was thus: "George the Third, to our trusty and well-beloved Sir *Edward Law*, knight, serjeant-at-law, greeting.—Know ye that we have constituted you our Chief Justice, to hold pleas before us, so long as you shall well behave yourself; and therefore we command you that you do apply yourself to the said office." The writ is, like all other writs, merely a command; it is an intimation that the King has appointed him Chief Justice, followed by a command to him to undertake the office. An office is a totally distinct thing from an honour. It is an appointment, and not a creation: it is held only during good behaviour: it is not an hereditament: and the right of the Lord Chief Justice to his office, like the right to a peerage under a writ, is not complete until he has taken the oath of office—until, in other words, he obeys the writ.

Lord *Coke*, in his 4th Institute (*d*), treating of the office of Lord Chief Justice, says, that functionary was originally appointed by patent, and the alteration must have been made by the authority of Parliament; and every other Judge, as well as the Attorney and Solicitor-general, have always been and are still appointed by patent; “for it is a rule of law that ancient offices must be granted in such forms and in such manner as they have used to be, unless the alteration were by authority of Parliament.” That rule supports my argument, that no person can be appointed to an office, and still less can an hereditary dignity be created, by writ. If the King intended to make a serjeant-at-law, or to confer the honour of knighthood of the Bath on persons, he issued a writ to them, commanding them to attend for the purpose, the one, of being invested with the dignity of serjeant-at-law, and the other, of receiving the dignity of the knighthood of the Bath. In neither case does the writ make the serjeant-at-law or the knight of the Bath; but the individual is commanded to attend the Sovereign, or the Judges, to receive those dignities. The writ conveys the intention of the Crown; but if the writ had remained in their possession to the end of their lives, they would be neither knights of the Bath nor serjeants-at-law, unless they had obeyed it, by attending and being invested with the respective dignities (*e*).

The *Vescie* case, on which the Attorney-general relies, is a solitary deviation from the general usage of five centuries, in which a declaration, inconsistent with the nature and object of a writ of summons, was added, which has never been repeated, and under which there was no succession. Can that case be

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(*d*) Pp. 74, 75.

(*e*) 12 Co. Rep. 70.

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considered sufficient grounds for your Lordships to presume that, at the distance of nearly a hundred years afterwards, the writ to Lord *Vaux* was like this solitary and anomalous writ, rather than like every other writ of summons upon record? This would be inconsistent with the rule of presumption in all other cases, for it would be to prefer the exception (I say the illegal exception) in the form of writs of summons, to the general usage. The general usage from the 1st to the 25th of *Henry* 8, was to create baronies by writ and sitting, and not by patent. Between those years fourteen barons were created; of that number only one (the Baron of *Marney*) was created by patent, which is on record, and all the other thirteen were created by writ and sitting. Of the thirteen baronies, six, namely, *Conyers*, *Monteagle*, *Sandys*, *Windsor*, *Wentworth*, and *Talboys*, have either been adjudged to heirs general by this House, or have been inherited by, or transmitted through females. Two, namely, *Hussey* and *Darcy*, were immediately lost by the attainder of the first peers. One, *Berkeley* (to which I have before adverted), became extinct. Two, *Mordaunt* and *Berkeley* (the brother of the former), are now vested in heirs general; so that of the thirteen, two only remain to be accounted for, and these are the baronies of *Vaux* and *Braye*, now the subject of your Lordships' consideration.

Lord *Sandys* was first summoned to Parliament in 15 *Henry* 8, on the same day as were Lords *Vaux* and *Berkeley*. He was again summoned in 21 *Henry* 8, for which the parliamentary pawn is preserved; and he was afterwards regularly summoned to, and repeatedly sat in, Parliament. The barony descended to *William*, his great-grandson and heir, who died in 1629, without issue; in May 1660, it was claimed

by *William Sandys*, grandson of *Elizabeth*, the half-sister and heir of *William*, and then heir general of the first Lord. It appears from the report in the Journals, vol. 11, p. 13, that the House was satisfied that the barony originated in a writ of summons, without requiring the production of the first writ, as it only required proof that he had on several other occasions been summoned to, and had sat in Parliament.

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In the year 1717, and again in 1832, the barony of *Berners* was claimed by the heir general of Sir *John Bouchier*, under a writ of summons issued to him by the title of Lord *Berners*, the 26th of *May*, 33 *Henry* 6 (1455), which is the first writ to Lord *Berners* upon record; but it appears from an original letter of privy seal, that he was summoned to the Parliament which met at *Reading*, 6th of *March*, 31 *Henry* 6 (1453), more than two years before any writ to him is on record. It is certain, therefore, that the writ in which the barony of *Berners* originated, was not produced, and that the House was satisfied with proof that there was no patent, and that Lord *Berners* had sat in Parliament, and consequently that the dignity had descended to his heirs general.

On the 9th of *August*, 21 *Henry* 8 (1529), general writs of summons to Parliament were issued, of which the parliamentary pawn is preserved. In *November* the same year, Sir *John Hussey*, Sir *Thomas Wentworth*, Sir *Gilbert Talboys*, Sir *John Mordaunt*, Sir *Edmund Braye*, and Sir *Andrew Windsor*, were summoned to, and took their seats in, Parliament, but none of their names occurs in the parliamentary pawn of the 9th of *August* preceding, and the writs to them are not enrolled or preserved. Their precedence is shown by the Lords' journals. The barony of *Windsor* was

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inherited by the heirs male, who were also the heirs general of the first baron, until 1642, when it fell into abeyance between the two sisters and coheirs of *Thomas*, the sixth Lord *Windsor*. In 1660, the King terminated the abeyance in favour of *Thomas Hickman*, the eldest coheir, by letters patent, which recite that “*Henry Windsor*, the fifth baron, had and enjoyed the dignity to him and his heirs, and that he had issue *Thomas Lord Windsor*, his son and heir, who died without issue, and two daughters, the eldest whereof married *Dixie Hickman*, esq., both deceased, leaving issue *Thomas Hickman*, who now enjoys great part of the ancient patrimony of Lord *Windsor*, and that it belonged to His Majesty to declare which of the said coheirs shall enjoy the dignity of their ancestors, of restoration and confirmation of the said barony, and of the title and dignity of Baron *Windsor*, which the said *Henry* and *Thomas* successively enjoyed; and his Majesty grants the same to the said *Thomas Hickman*, and his heirs.” Here again is proof that the barony was allowed to one of the co-heirs, notwithstanding the first writ was not produced.

The case of the barony of *Wentworth*, another of the baronies created in *November, 21 Henry 8*, on the same day as the barony of *Windsor*, is, I think, decisive of the point at issue; namely, that it is not necessary that the first writ to Lord *Vaux* should be produced. The barony of *Wentworth* descended to *Thomas Wentworth*, heir male and heir general of the first baron, who was created Earl of *Cleveland* in 1626, and died in 1667, without issue male. His son, who died in *vita patris*, left an only child, *Henrietta Maria*, who died without issue in 1686. Her aunt and heir, *Anne Wentworth*, married *John Lord Lovelace*, by whom she had one son, whose daughter and

sole heir, *Martha*, married Sir *Henry Johnson*. On the 25th of *March* 1702, the petition of the said *Martha Lady Johnson* to the Queen was read in the House of Lords, stating that she was sole heir (by her grandmother, the Lady *Anne Wentworth*, Baroness *Lovelace*, &c.) to the barony of *Wentworth*. The barony was allowed to Lady *Johnson*. The Attorney-general must admit that the *Wentworth* case is on all fours with that of *Vaux*, and that it decides the question. [The learned Counsel read from the minutes of the evidence in the *Braye* case, a copy of the proceedings in the *Wentworth* case (*f*), and proceeded.] The Committee were satisfied it was a barony by writ, (because there was no patent,) upon proof that the Lords *Wentworth* had sat in this House. There is no difference between the *Wentworth* case and this; but the impossibility of producing the first writ which summoned Lord *Vaux* to Parliament appears to create a doubt in the Attorney-general's mind whether this was a barony by writ. We have done in this case precisely what was done in the *Wentworth* case. We show writs over and over again, subsequent to the sitting of *Thomas Lord Vaux*, in the 25th of *Henry 8*; and I say confidently, that as evidence of the non-existence of a patent, of sittings in this House, and of writs of summons having issued, (although subsequent to the sitting,) was sufficient to convince the Committee, in 1702, that the barony of *Wentworth* originated in a writ, evidence of the same facts ought to convince your Lordships that the barony of *Vaux* was created in the same manner.

The case of the barony of *Strange* is still more conclusive in favour of the present claimants than the

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(*f*) *Vide ante*, p. 558.

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Wentworth case, because the very objection taken now by the Attorney-general was also made in that case. *James Stanley*, son and heir apparent of *William*, sixth Earl of *Derby*, was summoned to Parliament by the style of "*Jacobus Stanley de Strange, Chevalier*," by writ tested 17th of *February*, 3 *Charles* 1, 1628, under the notion that his father had inherited the ancient barony of *Strange*. No record of that writ can be found, and there is no parliamentary pawn in existence from the 1st to the 15th *Charles* 1, and no docquets of writs of special summons from the reign of *Elizabeth* to the 18th of *Charles* 1, are preserved. [He then stated the proceedings of the House on the claims to the *Strange* barony in the years 1726 and 1737, which had been before stated by Mr. *Lynch*; see pp. 554-5 & 6, *supra*.]

I have shown that your Lordships' journals do not contain a copy of that writ (issued to *James Stanley* in 1628), but merely state the fact that Lord *Strange* was summoned by writ. The Attorney-general says, we must produce the first writ, and the Counsel for the Crown appear also to have insisted upon the production of the first writ to Lord *Strange*, as appears from the Minutes. It is quite clear the writ was not produced. It is equally clear that the Committee did not know the contents of that writ; but it having been proved that the Lords *Strange* had sat in Parliament, the Committee presumed that the first writ of summons was in the usual form; and on finding that there was no patent, they decided that the claimant was entitled to the dignity. The possibility of there having been a limitation to heirs male in that writ was not thought of, or if thought of, had no weight with the Committee. The objections on the part of the Crown were overruled, and the claim was allowed.

If the House was satisfied of the correctness of its proceedings in the case of the barony of *Strange*, in the year 1737, as it had been in the cases of *Wentworth*, *Windsor*, and *Sandys*, in none of which was the first writ produced, why, I respectfully ask, should not the House be equally satisfied now? The Attorney-General observed that the short period in which those baronies were in abeyance formed one reason for presuming that the dignity descended to heirs general. My answer to the objection of the length of time in which the baronies of *Vaux* and *Braye* have been in abeyance is this, that it was not pretended in the case of the barony of *Botetourt*, that the length of time it was in abeyance—379 years—was an objection, or that it was a cause for presuming any particular mode of creation at variance with the general usage. The barony of *Willoughby de Broke* had been 173 years in abeyance; and the barony of *Berners*, 187. The case of the barony of *Clifton*, so carefully investigated in 1673, as to have become the leading case on this subject, is still more remarkable, because the right to it had been vested in a sole heir for fifty-six years, without any claim having been made. In the *Clifford* case the right had been vested in a sole heir for ninety-four years; but when claimed in 1737, that circumstance was not considered sufficient to raise a presumption that it was limited to heirs male. It is material to add that all these baronies, except *Botetourt*, were created long after the first creation of a barony by patent.

Upon the point of pedigree: The descent from Sir *Nicholas Vaux* to *Edward*, the fourth Lord *Vaux*, is so clear, and the proofs, adduced in support of it, have been so forcibly called to your Lordships' attention by my learned friend, Mr. *Lynch*, who has the same interest that I have in establishing that part of the

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pedigree, that I do not think it necessary to trouble your Lordships upon it; but as positive proof cannot be given of the death of three of the parties without issue, namely, *Edward Lord Vaux*, *William Vaux*, and *Henry Lord Vaux*, I shall submit a few observations on this subject. The proof that they did not leave issue must, from the necessity of the case, be inferential. They must be presumed to have died without issue from a number of facts, which could not have occurred in the common course of the affairs of life, if either of them had left children. The evidence that *Edward Lord Vaux* died without issue is this: First, his will, in which he mentioned his brother and his sisters, and took no notice of any child; Secondly, the settlement of his property on his step-sons, the children of his wife, who was the widow of the Earl of *Banbury*; and if he had had children, it is not likely that he would have passed them over; Thirdly, on his death his brother succeeded to the dignity; and there is no doubt that the laboured investigation which took place in this House, respecting the actual paternity of his step-sons, must have brought his own issue to light if he had had any.

With respect to *William Vaux*, his brother, only one trace has been found of him during the whole of this inquiry, namely, that he was mentioned in the will of his grandmother in the year 1597, when he was under eight years of age. Neither he nor his children are mentioned in the wills of his brother *Edward* in 1661, nor of his brother *Henry* in 1663, nor of his sister *Joyce* in 1666. In the settlement of lands made by *Edward*, in 1635, a schedule was annexed, which states that certain annuities were then charged on the property for *Henry* and *Joyce*, but no mention is made of *William*. Under all the circum-

stances, it is fair to presume that these three died without issue. *Doe dem. Oldham v. Wolley (g)*.

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The *Attorney-General*:—That case applies only to ejectment for land, which is different from a case of peerage, in which affirmative evidence of the death of a party without issue must be given; and my friends knowing that presumptive evidence is not sufficient, have in this case given affirmative evidence.—[Lord *Lyndhurst*:—Here the rights are fixed for ever.]—And therefore your Lordships have uniformly required that there should be affirmative evidence that the party died without issue.

Sir *Harris Nicolas*:—If the Attorney-general is satisfied with the pedigree, and if I may infer, from observations which some of your Lordships have made, that your Lordships are also satisfied on that point, I shall not add anything more on the subject. I have shown what is the rule of law in cases like the present, and what the House has done on four occasions in cases similar to this. These cases will, I hope, convince your Lordships that you cannot presume a patent without establishing a totally new rule of law with respect to baronies; and that if you do so, you will in fact decide that there are no such things as baronies by writ; because if you presume a patent in this case on the ground that no writ can be produced, there is scarcely a case in which a patent may not be presumed. With respect to presuming a clause of limitation in a writ of summons, I trust that I have satisfied your Lordships that such a writ never did occur but once during a period of 570 years; that you

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cannot therefore presume anything so opposed to the general usage; and that very serious doubts may be entertained, even if such a limitation had occurred in the first writ to Lord *Vaux*, whether it would have had any legal operation whatever. For these reasons I feel assured that your Lordships will be persuaded that the Barony of *Vaux* did originate in a writ of summons, in the usual form, in the reign of *Henry 8*, and that Mr. *Hartopp* is one of the coheirs of that dignity.

The *Attorney-general* replied:—The Petitioners differ as to the time when this peerage was created; one of the claimants stating that it was created in the 15th of *Henry 8*, in the time of Sir *Nicholas Vaux*, the father of *Thomas Lord Vaux*; and the other alleging that *Thomas Vaux* was the first Lord *Vaux* of *Harrowden*. It seems to me that the Petitioners have made out their pedigree, but that will still be for your Lordships' consideration. It appears that *Thomas Lord Vaux* was succeeded by his son *William Lord Vaux*; who was succeeded by his grandson *Edward Lord Vaux*; who was succeeded by *Henry* his brother, who died in 1663 without issue, leaving two sisters, *Mary* and *Catherine*. It appears to me that Mr. *Moslyn* has made out his descent from *Mary*, and that Mr. *Hartopp* has made out his descent from *Catherine*. There are two coheirs of *Catherine*, the Earl of *Pembroke* and Mr. *Hartopp*.

My Lords, I must protest against the doctrine stated at the bar, that it was quite enough for the claimants to show that they were descended from a child of the second Lord *Vaux*, without disposing of the other issue of that ancestor. They relied upon the case of *Doe v. Wolley*. Even in ejectment, I think that

is a case rather doubtful in its principle, because the Court of King's Bench said, that it is enough for the lessor of the plaintiff to show that he is descended from a younger child, and that it lies upon the defendants to show that they are the descendants of the elder children of the ancestor; Lord *Tenterden* observing, that to suppose that there were children of the elder branch, is to presume two things, that the eldest son married, and that he had children. I do not know that there would be any wild presumption in supposing that a man follows the law of his nature, and that he leaves descendants behind him. In ejectment, where an action is brought to recover land by the heir-at-law, he is to show he is heir-at-law, and he does not show that unless he induces the jury to believe that there are no descendants from the elder branches of the family. But allowing *Doe v. Wolley* to be good law, it never can be applied in a case of peerage, for there it is indispensably necessary that evidence should be given that the elder branches of the family have died without issue: otherwise, the consequence might be that your Lordships might decide in favour of a claim, and in the very next session there might be a petition on behalf of a descendant of an elder branch; in the meantime a new peerage is created. In case of ejectment, a new claimant could bring a new ejectment against the person who succeeded on a former trial; but in the case of a peerage, the evil would be irremediable, and therefore your Lordships have always required that reasonable evidence should be given to show that the elder branches of the family have died without issue. No longer ago than last session there was the case of the Earl of *Mar*, who claimed the earldom of *Kellie*. He was for several years unable to show that an elder

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brother of one of his ancestors, who had gone to *Ireland* in the time of the Commonwealth, had died without issue; for that reason your Lordships would not decide in his favour. At last, evidence was given to show that such elder brother had died without issue, and then your Lordships decided in his favour, and he is now Earl of *Kellie*, as well as Earl of *Mar*.

My Lords, the only doubt I find on examining this pedigree, is with regard to the priority of birth of *Mary* and of *Catherine*. There is a will of their grandmother *Mary*, wife of *William* Lord *Vaux*, in which, in enumerating her grandchildren, *Mary* is mentioned first. But then it is suggested on the other side—and your Lordships will determine to what weight the observation is entitled—that *Mary* is there left a considerably larger legacy than the other children, and that probably is the reason that she is first mentioned. It is also suggested that she might have been the god-daughter, as she was the namesake, of her grandmother, and for that reason also, and not because she was prior in birth, she is first mentioned in the will.—[Mr. *Lynch*: I have shown that at the marriage of *Mary*, *Catherine* could not be twelve years of age.]—Your Lordships will see whether there be any evidence to clear up that difficulty; I do not know that it is very material, because it does not at all touch the chief question in the pedigree, as to whether the claimants are both descended from the common ancestor.

But the important question is this: Has sufficient evidence been given of the creation of a barony descendible to heirs general? It is proved that in the 25th of *Henry* 8, *Thomas* Lord *Vaux* sat in your Lordships' House; and that in the 28th he had a writ of summons. He sat under that writ, and un-

undoubtedly his son and his two great-grandsons did sit as members of your Lordship's House. Now that is abundant evidence of a peerage; but is it evidence of a peerage descendible to the heirs general? The other evidence in the case may be dismissed, as not entitled, as I humbly conceive, to the slightest consideration. It was proved, that in the 7th of *Henry* 8, Sir *Nicholas Vaux* was a commoner; that he made his will, and there described himself as Lord *Harrowden*; that in the *inquisitio post mortem* he is described as late Lord *Harrowden*; and that, in an Act of Parliament passed a year or two afterwards, he is called Lord *Harrowden*. I apprehend that none of these facts is evidence that he was a Lord; because a peerage, as Lord *Coke* says, is to be tried by the record (*a*). But, supposing that Sir *Nicholas* was a peer, my learned friends must further show how he was a peer. They must show that he was a peer, with a peerage descendible to his heirs general. I deny the doctrine which my learned friend, Mr. *Lynch*, laid down; that it is enough in this case to show a sitting and a summons, let the summons be at any time or place. If the question be, peerage or no peerage, undoubtedly that is enough; because if there has been a sitting and a summons, it signifies not how long after the first sitting the summons may be, if it is proved that there has been a peerage; but then it shows only a peerage; it does not show that there was a peerage created by writ descendible to heirs general. Merely showing that *Nicholas* was a peer does not, in the slightest degree, remove the difficulty; which is, that *Thomas* sat in the 25th of *Henry* 8, and that he was summoned in the 28th of

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(h) 12 Rep. 70.

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Henry 8. The question therefore which your Lordships have to determine is this (there being, as I allow, a strict search made, and no patent forthcoming), whether your Lordships are bound to infer that the first person who enjoyed this dignity was called up to your Lordships' House by unrestricted writ, so as to have a peerage descendible to heirs general. I allow that if the Crown calls up by writ a commoner whose father is not noble, and he takes his seat, a peerage is thereby created descendible to the heirs of the body of that peer; but the person who claims a peerage descendible to heirs general, and who claims through females, is bound to show that there was a peerage created transmissible to females.

There is no evidence whatsoever of the writ by which *Thomas Lord Vaux* took his seat in this House: if he had not sat in the 25th of *Henry 8*, the difficulty would not have occurred; if he had only sat in the 28th, the same time that the writ appears, then the writ would be assignable as a creation of the dignity; but he sat before the date of the writ which is produced, and therefore it was not by virtue of that writ that he sat. By virtue of what instrument, then, did he sit in the 25th *Henry 8*? My learned friends say that your Lordships are bound to infer that he sat by virtue of a writ, and that that writ had no restriction in it. If that be so, they have made out their claim. But, my Lords, there are two other ways in which he might have sat; and unless your Lordships are bound to believe that he sat in the third way, when he might have sat in either of the other two, the claimants have not established their case. He might have sat by unrestricted writ, or by patent, limiting the peerage to the heirs male, or by a writ, limiting the descent of the peerage to the heirs male. If your

Lordships adopt either of the two latter suppositions, then the claim is not made out. My learned friends deny that your Lordships can adopt either of those suppositions. It is far from me to say that your Lordships are bound to adopt either; but that your Lordships may say that he sat by patent or by restricted writ, I do most confidently maintain.

My Lords, there has been a search for a patent; none is forthcoming, but your Lordships are at liberty notwithstanding to assume that there was a patent. There are repeated instances in which the King's grants, where search had been made, and they were not forthcoming, have been presumed. It has been decided that you may presume a charter under the great seal to a borough, granted within the time of memory; and I have known again and again, in *quo warranto* proceedings for the purpose of supporting a usage, a charter pleaded to be lost by time and accident; unless that could be presumed, such a plea would be bad, but it has been determined to be a good plea. Grants of tithes in the reign of *Henry 8*, are constantly presumed. There was a case lately before your Lordships with respect to whether you could presume a grant from a lay rector, so that tithes should not be considered as due in respect of a particular species of grain (*a*). Your Lordships adopted in that case the rule of law upon that subject which has been frequently acted upon. My learned friends have fallen into a fallacy in supposing that I contended that the production of a writ is necessary in this case. No such thing. The production of a writ is one thing; giving evidence of it is another. The production of a writ has been dispensed with in

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(i) *Andrews v. Drever, ante*, Vol. iii., p. 314.

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various cases, but the question is can you dispense with the evidence of the writ? The writ may be in evidence, though it is not produced. Even an Act of Parliament may be presumed, and *a multo fortiori* may a grant from the Crown. I have before cited two instances of peerage cases in which a patent was presumed, the *Purbeck* case, and the Dukedom of *Richmond*, in the reign of *James 1*. If you may presume a patent creating a Dukedom, and a patent creating a Viscounty, I am not aware of any reason why you may not presume a patent creating a barony—which may be created by patent as well as by writ—though the patent is not forthcoming, and though no enrolment of it may be discovered. You may presume a patent, and you may likewise presume a writ like that in the *Bromflete* case, and in the three cases in *Ireland*, which restricted the descent of the peerage to the heirs male, containing those words which are in the *Vescie* case: “Volumus enim vos et hæredes vestros masculos de corpore vestro exeuntes barones de *Vescie* existere.” Mr. *Lynch*, allowed that such was the prerogative of the Crown. Sir *Harris Nicolas* was more adventurous, and perilled his case upon the Crown having no such power. My Lords, I cannot doubt for one moment that the Crown has such a power. It would be strange indeed, if before the reign of *Richard 2*, when for the first time baronies were created by patent, your Lordships should believe that the Crown had no means of creating a barony descendible to the heirs male. The doctrine of Sir *Harris Nicolas* is, that the writ does not create the barony: no doubt it does not, but it enables the person to whom it has been granted, by taking a seat in your Lordships’ House, to acquire a barony; it operates as a conditional grant—it is a grant on condition that the

grantee shall take his seat in your Lordships' House, and then his blood is ennobled and the peerage descends to his posterity. Now, where is the difficulty in supposing that, as the King by his writ, without any restriction, may enable the person to whom it is addressed to gain a barony descendible to heirs general, he should by such words as I have mentioned, create a barony descendible only to heirs male? If he can grant the greater, he may grant the less—still the person to whom that restricted writ is addressed would not be noble until he had taken his seat; but as soon as he has taken his seat he is noble, and then he has a barony which is not descendible to the heirs general, as it would have been if the writ had been unrestricted, but descendible to heirs male, by virtue of the restriction contained in the writ. We have not only the instance of the *Vescie* case, in the reign of *Henry 6*; we have also three instances in the reign of *James 2*, in *Ireland*. But, says my learned friend Sir *Harris Nicolas*, *James* was then an usurper. My Lords, King *James* was not an usurper at that time; he was *de facto* and *de jure* King of *Ireland*; he held the crown of *Ireland* as an independent crown, he was then reigning in his hereditary dominions, and he created these three peerages by the writs I have mentioned to you, and I cannot help believing that those were according to the precedents in the Irish peerage, for in no other way can I account for this most remarkable fact in the history of the peerage of *Ireland*, that those ancient baronies in *Ireland* have almost always gone in the male line—those that were created in the reign of *Henry 2*, granted to the companions of *Strongbow*, have gone in the male line, whereas the *English* peerages of the same date have passed through females again and again to different families; and if there be

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now a barony descendible to females, it can hardly remain many generations in the same line, for one of the barons may die leaving only a daughter, who may marry into another family, and then the barony will go to that family. *James 2* followed the precedent in *Ireland*, when he created those three peerages towards the close of his reign, restricting them in the writs to heirs male. That must have been the case in the *Slane* peerage, which your Lordships have lately determined (*k*). Then in the *Slane* case there must either have been a patent so long ago as the reign of *Henry 2*, limiting that peerage to the heirs male, or the first Lord *Slane* was raised to the House of Peers by a writ restricting the descent of the peerage to his heirs male; and to suppose that the Crown cannot do so, seems to me to be a position for which there is neither authority nor principle.

My Lords, a very ingenious argument was adduced on the other side, to show that your Lordships acting judicially would presume that this was a creation by writ, and not by patent. That argument proceeded thus: "In every case there must be a writ, even where a peerage is created by patent, because the new peer always produces his writ at your Lordships' table. Now in this case there must be a writ, and, therefore, why should you presume both a writ and a patent? If you presume a patent, you are presuming two things; whereas, if you presume a writ, you presume only one thing." That is specious, but it appears to me not to be solid, because as there must be a writ in every case, a writ of some sort; therefore you may dismiss from one side and the other, as a mere equation, the fact that there was a writ. The question is, was the peerage created by writ, or by patent? My friends have no assistance from my admitting that there was a writ—that a writ

(*k*) *Ante*, p. 23.

accompanies a patent, and you must therefore presume a patent with a writ in the one case, and you presume only a writ in the other—it stands equal—you presume only one thing; you presume in the one case an unrestricted writ, creating a peerage, and in the other you presume a patent; therefore there is only one thing to be presumed. But with regard to a restricted or unrestricted writ, that would not at all answer their purpose, for in each case, supposing there was no patent, the writ must be issued; and if it were merely a writ, it might be restricted, or it might be unrestricted; and there are no more circumstances to be presumed, supposing it to be restricted, than if you supposed it to be unrestricted.

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I will now shortly advert to the cases which are relied upon. My learned friend Mr. *Lynch* confined himself to two; the *Strange* and the *Wentworth* cases. My learned friend Sir *Harris Nicolas*, on behalf of the other claimant, not only relied upon those, but also upon the *Sandys* case, the *Berners* case, and the *Windsor* case. If there were in any of those cases a decision of your Lordships, by which it was held that, where there were a sitting and a subsequent writ, and upon a search no patent forthcoming, it was the opinion of your Lordships that an unrestricted writ was to be presumed, there would be an end of the controversy; but I cannot find that that point has been debated in any one of them; and it will be found that, with the exception of the *Wentworth* case, the writ creating the peerage was always in evidence; and whether it was not so in the *Wentworth* case, appears to me exceedingly doubtful.

My Lords, the *Strange* case has nothing to do with the present, because the writ creating the barony of *Strange* was in evidence, and there never could be the

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smallest doubt that that was a barony created by an unrestricted writ. *Ferdinando*, Earl of *Derby*, was not only Earl of *Derby*, a dignity descendible to heirs male, but he was Baron *Strange*, descendible to heirs female. He left three daughters and no son. Upon his death, his heir male, *William*, the sixth Earl of *Derby*, succeeded to that earldom, and it was supposed, by mistake, that he likewise succeeded to the barony of *Strange*; he had an eldest son, *James*, who became the seventh Earl of *Derby*. In his father's lifetime, this *James* was called up to this House by writ, in the 3d of *Charles* 1, by his mere title, and was placed according to the precedence of the barony of *Strange*. The Countess of *Castlehaven*, one of the three daughters of *Ferdinando*, was entitled to the old barony of *Strange*, and it was a mistake to have called up *James*, the eldest son of the sixth Earl of *Derby*, as Baron *Strange*; and, without intending it, a new barony of *Strange* was thus created in the person of *James*. The Duke of *Athol*, being the heir general of *James*, claimed the new barony created in the person of *James*, descendible to the heirs general of *James*; and he was entitled to be Baron *Strange*, and he made out his claim. But your Lordships will see by referring to the evidence that it was proved most distinctly that *James* was called up by writ in his father's lifetime; that writ was not produced, but it was in evidence; therefore there was no possibility of presuming that he was created by patent.

The *Wentworth* case comes much nearer the present case than any of the others which have been cited, but the accounts your Lordships have of it are very defective, and it is very difficult to say what points were made and what points are to be considered as decided. In Mr. *Cruise's* account of it, it is stated that *Martha*,

the wife of Sir *Henry Johnson*, claimed in 1710 the barony of *Wentworth*, and stated in her petition that *Henry* 8, by his writ, directed to *Thomas Wentworth*, summoned him to be a baron and peer of the realm, by the name of *Thomas, Lord Wentworth*; by virtue whereof not only the said *Thomas*, but also the heirs of his body had enjoyed the said title and barony of *Wentworth* until the death of *Thomas Lord Wentworth* in 1664, leaving issue *Henrietta Maria*, his sole daughter and heir, who died without issue, whereby the Lady *Ann Wentworth*, relict of *John Lord Lovelace*, and mother to *John Lord Lovelace*, the petitioner's father, being the only surviving daughter of *Thomas Lord Wentworth, Earl of Cleveland*, and aunt to the said *Henrietta Maria*, became heir to the said barony, so that the petitioner was become the sole and undoubted heir of that barony of *Wentworth*, and therefore prayed that his Majesty would confirm the said barony to her and the heirs of her body. This petition having been referred to this House, it was resolved that the petitioner had right and title to the barony of *Wentworth*, and the King confirmed it accordingly. This account does not in the slightest degree show what evidence was given of the creation of the barony of *Wentworth*; and for any thing which appears here, either the writ might have been produced, or there might have been secondary evidence of it, from which it would appear that it was a peerage descendible to heirs general; and unless your Lordships have complete evidence of the proof made upon that occasion, it appears that any adjudication of the Committee of Privileges upon it is really entitled to very little weight. There is another account of the *Wentworth* case in Mr. *Hartopp's* case, laid before your Lordships: "This barony descended to *Thomas*

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Wentworth, the heir male, and heir general of the first Baron, who was created Earl of *Cleveland* in 1626, and died in 1667, without issue male. His son, who died *in vitâ patris*, had been summoned to Parliament in his father's barony of *Wentworth*, and left an only child, *Henrietta Maria*, who died without issue, in 1686. Her aunt and heir, *Anne Wentworth*, married *John Lord Lovelace*, by whom she had one son, *John Lord Lovelace*, whose daughter and sole heir, *Martha*, married Sir *Henry Johnson*. On the 25th *March*, 1702, the petition of the said *Martha* to the Queen, was read in the House of Lords, in which she stated—[after reading the petition and the proceedings on it, as before read by Mr. *Lynch*, p. 558, *ante*, the *Attorney-general* proceeded:]—My Lords, this statement of the case proves nothing, for it does not appear from it what evidence was laid before the Committee of Privileges: we have here a brief, or a copy of a brief, supposed to be found at the Heralds' office, and I think your Lordships have already intimated that no attention can be paid to it. But there is read from your journals, what is most material, namely, the account of the evidence that was actually given when Lady *Johnson's* petition was heard; that is to be found in the minutes of evidence in the *Braye* case, and this really is what my learned friends on the other side of the bar have mainly to rely upon. But it is merely a loose note, taken probably by the clerk's assistant of your Lordships' House, at the time when the proceedings of your Lordships' House were not taken in the careful and accurate manner in which they now are.

Now your Lordships have to say, whether you can safely infer that in the *Wentworth* case your Lordships' predecessors, in the absence of all evidence of the writ, and upon proof that there was a search for a

patent, and no patent forthcoming, determined that they must infer that there was a creation of that peerage by unrestricted writ. I do not find any such point made; it is impossible that the House can hold it on the imperfect note taken of the evidence, of which there are not more than about twenty lines in the whole. It is very difficult to say what was the evidence really given; and if you are to look to the reply of the Attorney-general, you will not suppose that the point of law was determined, whether if there be a creation of peerage by writ, it creates a peerage descendible to the heir general; because what the Attorney-general says is, "I cannot controvert, but if he was called by writ it creates a barony in fee." The facts, therefore, are left uncertain, the law that was agitated and decided in that case is left uncertain; and I cannot say that it appears to me to be anything like an authority for the general position for which it is cited, that where there is a sitting and a subsequent writ, and a search, and a patent not forthcoming, your Lordships are bound to infer that there was a creation of a barony in fee, descendible to heirs general.

The other cases on which the claimants rely, appear to me to have little or nothing to do with this case. In the *Sandys* case your Lordships will find that the writ was in evidence, because you will find that the sitting and the writ were contemporaneous. It appears to me, from the statement of it in Mr. *Hartopp's* printed case, that the House was satisfied that the barony originated in a writ of summons, without requiring the production of the first writ issued to Lord *Sandys*; for the House only required proof that he and his heirs had on several occasions been summoned to, and that they had sat in Parliament. The Committee for Privileges reported, "That, upon search made in the office of the Petty

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Bag, in the pawns there of record, that in a Parliament held the 3d of *Nov.* in the 21st *Henry* 8, *William Sandys* of the *Vine*, Chevalier, was summoned up by writ of the said King, bearing date the 9th of *August* in the said year. The like writ of summons, dated the 1st of *December*, in the 36th of *Henry* 8, was directed to *Thomas* Lord *Sandys*. The like writs were directed to *Thomas* Lord *Sandys*, in the 6th and 7th of *Edward* 6, and in the 1st, 2d, 3d, 4th, and 5th of *Philip* and *Mary*. The like writs were issued to *William Sandys* of the *Vine*, Chevalier, in the 28th, 30th, 35th, 39th, and 43d of Queen *Elizabeth*. The like writ was issued to *William Sandys* in the 1st year of King *James*; upon this it is ordered that the records be searched against to-morrow morning, and then the heralds are to attend, and give their Lordships satisfaction herein, and in the point of place where the said Lord *Sandys* is to sit in this House as a peer, the House being satisfied of his Lordship's title to the honour. Lord *Sandys* took his seat on the next day." Now in that case the difficulty did not arise which my learned friends have to struggle with here, because there was no sitting until the 21st of *Henry* 8, and along with the sitting was the writ that was in evidence; therefore this is no authority at all for the proposition that where there is a prior sitting and a subsequent writ, and no patent forthcoming, your Lordships are bound to presume that the peerage was created by writ. The *Berners* case is to be found in *Cruise* (l), and your Lordships will find that that was exactly like the *Sandys* case, and the *Conyers* case, which my learned friend once relied upon, but has now abandoned. There the sitting and the writ were contemporaneous,

(f) On *Dignities*, p. 206.

and there was evidence of the writ at the same time as the sitting, and it was held to be a barony in fee.—[The *Attorney-general* having read the statement of the *Berners* case, proceeded thus:—Your Lordships see that the first time that Lord *Berners* sat in Parliament, there was produced a writ of summons to Parliament in the 33d of *Henry 6*, directed “*Johanni Bourchier de Berners*,” along with several other writs directed to him afterwards, and also to his grandson and heir. Then it was reported “that the Committee had inspected the journals of the House in the reign of *Henry 8*, and found the name of Lord *Berners* entered therein as present several days; That it appeared to the Committee that the petitioner was, by the death of her brothers and sisters without issue, become sole heir to Sir *John Bourchier*, knight, first Lord *Berners*, and was lineally descended from him: and the House resolved that the said *Catherine Bokenham* had a right to the said barony of *Berners*.” A perfectly sound decision, because she made out her pedigree most distinctly; and it was made out that the first time Lord *Berners* had sat in Parliament, was the 33d of *Henry 6*, and the writ by which he sat was actually forthcoming; the case was therefore complete as the case of a barony in fee descendible to heirs general.

My Lords, the only other case that my learned friend relied upon, is the *Windsor* case: in which there was no reference to this House, nor any decision at all, but a mere determination of the Crown to determine the abeyance of the barony.—[The *Attorney-general* having read an account of it from Mr. *Hartopp*’s case, as it was before read by Sir *H. Nicolas*, *ante*, p. 586, proceeded:—Now, my Lords, what does this prove? In the year 1660, the barony of *Windsor*, having been in abeyance since the year 1642, the

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King determined the abeyance in favour of *Thomas Windsor*, alias *Hickman*. Is that anything like an authority for the position for which my learned friends are now contending? In the first place it is no judicial determination at all. I have no doubt there was reasonable evidence laid before the Attorney-general of the day, or whoever might have had the honour of being consulted by the Crown, that this barony of *Windsor* was created in the reign of *Henry 8*, by such a writ as would give the barony to heirs general, but we know nothing of the evidence on which the Crown proceeded.

Under these circumstances it will be for your Lordships to determine whether in this case there has been sufficient evidence of the creation of such a peerage descendible to the heirs general. I must remind your Lordships that it is possible that hereafter there may be a patent produced, showing that this peerage was created by patent and limited to heirs male; and that the heir male may make his claim. I must remind your Lordships that it is possible that, if the dignity was created by writ, that writ may be produced, and that in that writ there may be a restriction, making it descendible only to heirs male, and that the heirs male may come to your Lordships' bar and make a claim to this peerage. What would be the consequence, if in the mean time you had advised the Crown that it was a peerage descendible to the heir general, and that *Mr. Mostyn* and *Mr. Hartopp* had made out their case, and that it was competent to the Crown to determine the abeyance in their favour? Then there would be created, in the year 1836, without intention, a new barony of *Vaux*, which would be descendible to the heirs general, just as there was in the time of *Charles 1*, a new barony of *Strange*, which was descendible to heirs

general. Your Lordships will have to consider whether, to guard against so serious an evil, you are not restrained from coming, on the evidence now before you, to the determination that this peerage was created by writ, and by writ without restriction.

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The *Lord Chancellor*:—My Lords, in investigating the claim to this peerage, your Lordships have had evidence adduced to establish the pedigree of the claimants, *George Mostyn* and *Edward Bouchier Hartopp*; and in the course of the evidence your Lordships have also had proof of the title of the Earl of *Pembroke*, as claiming with Mr. *Hartopp*. In the course of the proceedings, I attended to the detail of the evidence, as it was brought forward to substantiate the pedigree, as laid before this House; I have also since examined the evidence accurately, as printed, and I think that the pedigree and derivation of the title from the person, whom we find last sitting in this House as a peer by that title, are satisfactorily established. In all these cases the difficulty is, not so much to prove the direct line in which the parties claim, as to dispose of all those collateral branches, who, did they exist, would interfere with the right of the parties claiming. It appears to me that in this case the collateral branches, as they came into esse, have been disposed of as satisfactorily, under the circumstances, as can be reasonably expected. I think, therefore, that your Lordships may proceed to the consideration of the question of title, assuming that *George Mostyn* has proved himself to be descended from *Mary Vaux*, who was one of the sisters of *Henry Vaux*, the last peer; and that *Robert*, Earl of *Pem-*

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broke, and *Edward Bouchier Hartopp*, appear to have been descended from *Catherine Vaux*, who was sister of that *Mary Vaux*; so that the claimant, *George Mostyn*, would represent the whole interest of *Mary*, and the other two would represent the interest of *Catherine*. There was a question raised whether *Catherine* was, or was not, the younger sister of *Mary*. I think that matter also was satisfactorily explained, and it appeared that *Mary* had been properly placed in the pedigree, as she is there represented, before *Catherine*.

Then, my Lords, the important question is, how these parties have made out the proposition that the peerage was a peerage descendible to heirs general? There was some evidence given of Sir *Nicholas Vaux*, the father of *Thomas Vaux*, having been described as a "Lord," but there certainly was no such evidence as could be satisfactory to this House, of his having been a peer. The evidence, as affecting the son, *Thomas Vaux*, is, however, very differently circumstanced, for your Lordships find that in the 25th of *Henry 8*, *Thomas*, Lord *Vaux*, sat in this House. There is no evidence of any writ to him in that year or before. There is no evidence of any patent, nor is there any proof before the Committee of the title by which he sat in this House in that year. But his name appears amongst the Lords summoned in the 28th year of *Henry 8*, and the argument at the bar against the claim has turned very much upon that fact of his having been found sitting in this House before the time in which his name appears amongst the Lords who are comprised in the writ of summons.

My Lords, the fact of *Thomas* Lord *Vaux* having been a peer, is, therefore, unquestionable: he is found sitting in the House; his name is afterwards com-

prised in the writ of summons, and there is no question but that *Thomas* Lord *Vaux*, having been a peer, had a son named *William*; that that *William* had a son named *George*; and that *George* was the father of *Edward*, who succeeded his grandfather, *George* the father having died in the lifetime of *William*; and then there was another son, the brother of that *Edward*, namely, *Henry*, who succeeded to him (*Edward*), and upon the death of that *Henry*, the title became in abeyance; provided the title was then descendible to females. It appears that that *Henry* died in the year 1663, and, no doubt, a very long period of time has since elapsed, during which no claim has been made to this peerage, from the fact of no issue male being then living of *Thomas*, who appears to have been the first peer, at least the first person of whose title as a peer we have any evidence, and there being none but heirs female.

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If, my Lords, there had been but one female, undoubtedly the presumption would have been extremely strong against the title of females to succeed, because there would have been a person, who, on the supposition of the peerage being descendible to females, would have been entitled to the peerage, and the absence of all claim on the part of such a person or her descendants, for that length of time, would lead to the irresistible conclusion that there could be no title in persons who had so long abstained from making any claim to the peerage. But we find that that was not the case; for there being two sisters of the last peer, *Henry*, standing in equal degree, the title was in abeyance; and the presumption, therefore, does not arise, at least not so strongly, from the circumstance of no claim having been made. The circumstance of no claim having been made was also

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attempted to be explained by the situation and relation of the parties, which made it improbable and useless for them to make a claim to the title. There, however, seems to be sufficient to explain the absence of claim in the circumstance that from that time the peerage has been in abeyance, and therefore it required the aid of the Crown to enable either party to assume it. Therefore the case stands upon what conclusion your Lordships may come to as to the title which existed in *Thomas Lord Vaux*; and, on the part of the claimants, evidence has been offered of searches made in every place where not only the patent itself, if it existed, could be expected to have been found, but in every place where any preparatory steps towards the granting of a title by patent might be discovered, and I believe your Lordships are satisfied that the negative evidence of there being no existing patent is as satisfactory as the nature of the case will admit; and there appears to be not only no patent enrolled, but there is no trace of any of those preliminary proceedings, which are to be found in the various offices in cases of creation by patent.

Then, my Lords, we have to account for the sitting of *Thomas* in this House, in the 25th of *Henry 8*. That sitting is stated at the bar, on the part of the Attorney-general, to be referrible to some one of three causes, and it is quite clear that there are not more than three—perhaps your Lordships would think not more than two—which could possibly have given rise and been the foundation of that sitting. It must either have been by patent, or it must have been by the usual and ordinary writ: or another case was put by the Attorney-general, and supported by one authority, namely, that it might have been, although by writ, yet so worded as to limit the mode of inheritance of

that title. It is admitted on all hands—and that is unquestionably the rule—that, if the creation appears to have been by writ, and that writ is in the ordinary terms, the summons by writ, accompanied by a sitting in this House, would create a title descendible to females. These are the three grounds upon which, and upon which alone, the title, unquestionably existing in the 25th and 28th of *Henry 8*, is to be accounted for.

My Lords, it is said, that in the absence of all proof either way, but from merely finding a peer sitting in the House, there is no more reason for presuming a sitting by writ than there is for presuming a sitting by patent; that there being an absence of all proof of the title under which *Thomas Lord Vaux* sat in the 25th of *Henry 8*, your Lordships are not to come to a conclusion, presuming that sitting to be by writ, which would be one species of the creation of an estate, in preference to presuming that the title originated in a patent, which would give another species of estate, and which would exclude the present claimants, according to the ordinary mode in which titles are granted by patent. It does not appear to me that the two presumptions stand at all on the same footing. In the first place, all peerages must have their origin in a writ; whether a peer be created by patent, or by a summons from the Sovereign and acting upon that summons by taking his seat in this House, the writ must be the means of his introduction here. If there be a patent, the effect of the writ is limited by the terms of the patent, but still a writ there must be; therefore, although it is a presumption, as everything is a presumption where you have not the thing proved; yet it is an irresistible presumption that there must have been a writ, and that *Thomas Lord Vaux*, before he took his seat in this

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House, must have had a writ. My Lords, on the other hand—the question of a presumption of a patent—when we look at the history of the peerages of that time, we find that, although the custom had been introduced of creating peerages by patent, it was very rarely done, and the usual mode of creating peerages was by writ, and by acting upon it by sitting in this House. It is, therefore, no violent presumption in point of history, that a peer, found sitting in the House in the 25th of *Henry* 8, had obtained his title to sit here by a writ unaccompanied by a patent. But, my Lords, on a question of presumption, the law will presume all that is necessary to account for that which appears to have been done, and it will irresistibly presume that which must necessarily have accompanied the act proved ; so that, when we find a peer sitting, we conclude that there must have been a writ to bring him to this House ; though the writ itself is not produced, yet that there must have been a writ, is a matter on which your Lordships cannot entertain any doubt. But it is a different thing when your Lordships are called upon to presume that which was not necessary to have taken place ; for the peer might have sat without a patent, and he could not have sat without a writ ; and there is no necessity, therefore, for presuming a patent, inasmuch as the patent would in all probability have created a different estate from the estate created by writ and summons.

My Lords, it is absolutely necessary to obtain all the information within our reach, for the purpose of coming to a satisfactory conclusion as to whether there was a patent or not. Now it appears to me that, though there is a great deficiency of evidence as to writs issued before a certain period, upon inquiry it will be found that at that period the indi-

vidual writs were not preserved, and that the writ is not to be expected to be in the possession of the individual whose descendants claim the benefit of it, inasmuch as that writ is always taken from the individual, and ought to be kept amongst the records of this House, and yet amongst the records of this House the writs of that period are not to be found. With respect to patents it is different, because, for the protection of the Crown, that the presumption may not be carried beyond that which the Crown intended to grant, the patents are preserved. There are different offices for that purpose, and different forms are necessarily gone through before a title is granted by patent, all which renders it more easy afterwards to ascertain whether that patent existed or not. Now, inquiry has been made in every place in which it appeared probable, or even possible, that any trace could be found of a patent being granted to *Thomas Lord Vaux*, and the result of that inquiry is, that there is no trace whatever of such a patent. There is therefore evidence as strong as any negative evidence can be, that no patent exists, granted by the Crown, under which *Thomas Lord Vaux* took his seat in this House.

My Lords, if this case had been free from any influence by precedent, it would not seem to be any presumption contrary to the ordinary rules of law when we are called upon to investigate and ascertain under what title *Thomas Lord Vaux* sat in the 25th of *Henry 8*, if in that state of the evidence which I have stated, we come to the conclusion that he must have taken his seat under a writ. But, my Lords, before I refer to precedents, I will advert to the other objection made on the part of the Crown by the Attorney-general,—supposing your Lordships to be

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satisfied of *Thomas Lord Vaux* having sat by writ,—namely, that the writ may have been in a particular form. My Lords, it appears, after all the investigation which has taken place, that only one instance is found in *England*, in which there was a writ limiting the order of succession to the peerage. It is said that in *Ireland* there are three others; but in this country I find but one referred to. That single exception itself, without adverting to the argument that your Lordships heard at the bar, as to whether the Crown could or could not by writ effectually limit an estate in tail male in a peerage, the peerage not depending upon the writ; but throwing out of the account the peer sitting in this House, and being brought to this House by virtue of a writ, whether the Crown could or could not by this means limit the effect, which by the constitution of this country results from the act of sitting in this House. The circumstance of there being, amongst all the existing peerages created by writ—all the earlier baronies being by writ,—there being but one instance to be found, in which there was any attempt made to limit the estate acquired by the summons and sitting in this House, I apprehend would be an answer to any presumption to arise in favour of the writ not being in the ordinary terms, but being limited, as it is said to be limited in the particular instance referred to; the writ to *Bromflete*, in the 27th of *Henry 6*.

But your Lordships will find, I think, from the precedents which have been produced, where the writ itself has not been forthcoming, and where therefore the House has been under the necessity of coming to some conclusion as to what was the nature and the form of the writ under which the peer sat, that this House has assumed that the writ has been in the ordinary form, and in several instances that have been

cited at the bar (to some of which I shall presently advert) that question must have come distinctly before the House, and, in fact, in all the cases in which the writs were not forthcoming, and in which therefore the House was obliged to come to some conclusion as to the supposed effect of the non-produced instrument (that instrument so proved to have existed by the fact of the parties sitting in this House), the House has taken for granted and has reported that the title under the writ was in the ordinary form, and that the writ was the ordinary writ. One case, however, contains every circumstance necessary for your Lordships' decision on the present case; others, which have been referred to, have in part been explained, so as not directly to apply to all the parts of the present case. But the *Wentworth* case is identical with this: there is no distinction to be found between the two, and there is a most extraordinary identity, for there is a sitting at the same time and under the same circumstances, the same absence of proof of how the sitting commenced, and the same evidence of the name being included in the subsequent writs, though no proof how the sitting originally commenced. In the *Wentworth* case, which was decided in 1702, it appears that there was a sitting in the 25th of *Henry* 8, the very same period in which the sitting is proved in this case. There are eight summonses to several successive Parliaments, and the detail of the evidence, which was before the House at the time that peerage was in discussion (as found in the minutes of evidence in *Mrs. Otway Cave's* case, referred to in the papers respecting this peerage), appears to be this:—"First of *April* 1702, the counsel and heralds upon *Sir Henry Johnson's* claim to the barony of *Wentworth*; *Sir Thomas Powis* opens the case for the petitioner, the

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wife of Sir *Henry Johnson*,—she is the lineal heir to Lord *Wentworth* in the 21st year of *Henry 8*; he cites the pedigree as in the printed case. We are the daughter and heir of that family, lineally descended—this hath not been in abeyance—this lady is the single person; we hope that will be allowed us; Sir *Thomas* appeals to the journals. He is entered in the journals 25th *Henry 8*, and 28th *Henry 8*. Lord *Wentworth* was present, as appears by the journals, and so the several days after. They produce the records of the petty bag to show the writs of summons 30th *Henry 8*; they read Lord *Wentworth's* summons to Parliament; they read summons 1st *Edward 6* and 15th *Charles 1*. The Earl *Cleveland* is summoned, and his son brought into Parliament, and so admitted. We have the evidence from the Heralds' office. They produce the heralds' books. Sir *Henry St. George*—he says, this book has been in my office ever since his time, and looked upon to be very good. Mr. *Grimes, jun.*: I have searched the rolls, and find no patent at all. I never knew any writs filed in our office:—counsel and heralds withdraw. Mr. *Attorney-general* heard; says, I am satisfied, I cannot controvert, but if he was called by writ, it creates a barony in fee. Ordered and adjudged that the claim to the barony of *Wentworth* be allowed."

Your Lordships see there was, in that case, much less evidence of search, much less satisfactory proof therefore of the absence of a patent; there was, however, evidence enough to satisfy the House; there was before it the unexplained fact of a person so sitting having been included in the subsequent writs of summons; there was evidence by search, that there was no trace to be found of a patent; and on such evidence, the House came to the conclusion that the title was made out, and that it was a title descendible to

females. It must, therefore, have assumed that the title originated by a writ and sitting; it must have come to the conclusion that there was nothing to limit the effect of such summons and such sitting; and it must also have come to the conclusion that the writ was to be presumed to have been in the ordinary form, and not containing any special limitations or conditions, and that there was not such a probability or such a presumption of its containing any special limitations or conditions as to authorize the House to proceed upon the ground of its containing any such restrictions or limitations.

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My Lords, there is then Lord *Strange's* case, which is at least available for this purpose, to show that where the writ itself is not produced, there is no ground upon which the House will abstain from coming to the conclusion that it was a writ in the ordinary form, because by possibility it might have been in some other form. That case is stated in the additional case presented by Mrs. *Otway Cave*. The Duke of *Athol's* petition was referred to the Lords' Committees for Privileges, and the following extracts from the minute-book of the Committee prove that a copy of the original writ to Lord *Strange* was not produced, and that it was presumed to have been in the usual words:—"Then the order of reference was read; the petitions of the Duke of *Athol* to the King, claiming the barony of *Strange*, read. The Attorney-general's report upon his Majesty's reference was read; counsel were called in, and Mr. *Strange* was heard for the claimant.—[His Lordship having read from the minutes the proceedings in the *Strange* case, as they were before read by Mr. *Lynch, ante*, p. 554-5, proceeded:]—It was said, and truly said, there was some evidence of a writ; unquestionably there was some

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evidence of a writ, but there was no evidence of the contents of the writ; and this precedent, therefore, is as strong as that of the *Wentworth* case, to show that where the House is satisfied that the title originated in a writ of summons, and there is no ground upon which it can be presumed that the writ was otherwise than in the ordinary form (in short, it is stated in express terms), the writ is to be presumed to have been in the ordinary form. In the *Sandys* case, the circumstances with reference to this point are precisely the same, and there the House assumed that it was the usual form.

My Lords, these several cases, although they do not correspond precisely in all their circumstances with the *Wentworth* case, or with the case now before the Committee, yet they all contain some one, at least, of the propositions which are essential for making out the title of these claimants. Upon these precedents, it appears that your Lordships have, in the cases referred to, decided; in the first place, acting upon the evidence of a sitting unexplained; and after proof of a search in every place in which it was likely that any trace of a patent could be found, finding the case to be one of negative evidence, proving so far as it went that there was no patent, your Lordships have assumed that the sitting was under a writ; and it also appears that your Lordships having come to the conclusion that the sitting was under a writ, in the absence of all evidence of a patent, have assumed that the writ was in the usual and ordinary form.

If then your Lordships are now disposed to act upon this presumption, which this House has acted upon in former times, your Lordships can only come to the conclusion that *Thomas Lord Vaux*, who was

found sitting in this House in the 25th of *Henry* 8, sat by writ and not by patent, and that the writ was in the ordinary form, and therefore gave to him a title descendible to females. Under these circumstances, I submit to your Lordships, that the claim of Mr. *George Mostyn* to represent and stand in the place of *Mary Vaux*, who with her sister, *Catherine Vaux*, became entitled to that peerage so falling into abeyance on the death of their brother, is made out; that Mr. *George Mostyn* represents the one half, that is the interest of *Mary Vaux*, and that Lord *Pembroke* and Mr. *Edward Bouchier Hartopp* represent the other half, which became vested in *Catherine Vaux*.

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Lord *Lyndhurst* :—My Lords, I do not rise for the purpose of entering at large into this case, but merely for the purpose of stating that I concur in the view that has been taken of it by my noble and learned friend. I am satisfied, after looking at the evidence with respect to the searches which have been made for a patent, with so much care and with so much diligence, not merely into the patent rolls, but into the offices through which all the preliminary proceedings must pass, that this was not a peerage created by patent; and I think that what my noble and learned friend has observed is extremely correct. During the period in question, from the 1st of *Henry* 8, to the 21st or 25th of *Henry* 8, out of fifteen peerages that were created, fourteen were created by writ, and one only by patent. We have, therefore, the strongest evidence leading to the conclusion that this peerage was not created by patent; and if the peerage was not created by patent, it must be presumed that it was created by writ. The question then is, are we to

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presume that it was a writ in a general form, or are we left in a state of uncertainty as to that point, so as not to be able to come to any correct conclusion? What my noble and learned friend has stated is perfectly true, that during a period of 500 years, only one case has occurred of a writ creating a peerage in the special form which has been referred to. Under such circumstances, I think that we are bound to presume that the writ was in the general form; and if so, then it follows, as a matter of course, that the peerage descends to heirs general.

My Lords, I should have come to this conclusion independently of any authority; but the case to which my noble and learned friend has referred, which has been investigated by him with great minuteness, appears to me to be precisely the same with the case before your Lordships. My noble and learned friend has read the minutes before the Committee which investigated that case. It appears that there was evidence to satisfy that Committee that there was no patent, and they then came to the conclusion that as there was no patent, the peerage must have been created by writ; and if by writ, they seem to have presumed, and, I think, very correctly, that it must have been a writ in the general form; and they came to the conclusion that the claim in that case was established. There appears to be no reason, therefore, why we should not, on the authority of that case, and for the reasons stated in detail by my noble and learned friend, in this instance come to the same conclusion. I will not enter at large into the question of pedigree: it appears to me that that is made out with great clearness and precision. It appears, upon the evidence at your Lordships' bar, that the writs of that period are not forthcoming, and are not

produceable. We examine as to a patent, and we find there was no such patent of that period from the 1st to the 25th of *Henry* 8. It appears, upon an examination and investigation of the patent rolls in the Rolls' chapel, that they have all the appearance of being entire and perfect. With respect to writs, the records of them are defective at that period; there is evidence, therefore, to show distinctly that this peerage could not have been by patent. We presume, then, that it must have been by writ; and as no evidence can be traced of a special writ, and the writs of that period are general, I think, under those circumstances, we are justified in coming to the conclusion that this peerage was created by a writ in the ordinary form.

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Lord *Wynford*:—My Lords, I confess, at the outset of this case, that I felt considerable doubt with respect to both the points of law on which you have been addressed by my noble and learned friend. I am now satisfied upon both those points. In the case of the *Wentworth* barony, it was held that upon the evidence then adduced the presumption of a writ arose; and that presumption being raised, it is much more difficult to presume a special writ than it is to presume a general writ. The evidence undoubtedly proves that at the time at which this peerage was created, or about that time, in general, peerages were conferred by writ, and not by patent; and that is a circumstance upon which some presumption is raised that this peerage was created by writ, and not by patent. In the next place, with respect to a patent, there would be some evidence, not only of the patent itself, but of some of the preparatory steps before the patent was enrolled. Upon the investigation of the case, there is no evidence of any preparatory step;

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all the offices that would contain such evidence have been searched, and no trace of any such patent has been found, and it has been proved that not merely this particular writ, but all the writs—which is still stronger than evidence with respect to this particular writ—all the writs of that time are either destroyed, or for some reason or other cannot be found. We are, therefore, in this instance, as my noble and learned friend has said, under the necessity of presuming a writ. It appears by the journals that Lord *Vaux* took his seat in this House, and he could not come to this House but by some writ. Then did he come by a general writ or by a special writ? The general writs are very numerous, but there is only one special writ. Why are we to presume a special writ, which has occurred but once, and not a general writ, which has occurred many times? It appears to me that the balance of evidence is in favour of the presumption that he was called here by a general writ, and not a patent. Though, I confess, I lament that that law was ever established, yet I think that we must abide by it.

With respect to the particular claims of the two individuals whose cases are now before your Lordships, I felt it my duty, a few days ago, to examine with great attention every link in the two chains of the pedigree, and it appears to me that every link is most satisfactorily established, and there is evidence which ought to satisfy the House of the title to a peerage, for it is evidence on which a jury could not hesitate on a title to property. Under these circumstances, I most fully concur in the opinion of my noble and learned friend, that these claims are most satisfactorily made out.

Lord *Brougham* :—My Lords, not having attended

the hearing, I should not have taken any part in the discussion on this case, but I have had an opportunity of reading the evidence, and I am perfectly satisfied that the evidence is sufficient, as far as it goes, as to the presumption. I am perfectly satisfied that in the circumstances of this particular case, there is sufficient to entitle your Lordships to arrive at the conclusion that there was a writ, a summons, and a sitting upon that summons. I wish to guard myself against going any further, for I have heard some parts, but not the whole of the argument of my noble and learned friend who commenced this discussion, and my noble and learned friend who spoke last, that would rather lead to a proposition, which none of your Lordships, I trust, on consideration would be inclined to support, namely, that in the absence of evidence the presumption is in favour of a sitting by writ upon a summons. That certainly cannot be what is meant, and your Lordships can only be understood to express that the present decision has regard to the circumstances of the particular case.

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Lord *Lyndhurst* :—My Lords, the way in which I beg to put the point, is this : The patent rolls are searched for the purpose of ascertaining whether the peerage is created by patent : I am satisfied upon the evidence that the peerage was not created by patent : I do not go into the detail of that ; the inquiry was the most minute that could possibly be instituted. Then if the peerage was not created by patent, unless it was created by Act of Parliament, which is possible but not probable, it must have been created by writ. If created by writ, then the next question remains to be considered, Was it a special or a general writ ? In 500 years there is only one instance of a special writ, the case of

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Bromflete. I think, therefore, that we are entitled to assume that it was not by a special writ. I think that my noble and learned friend would hardly conceive that there was any doubt with respect to this point.

Lord *Brougham* :—Certainly not; it is not to that point I have addressed myself.

Lord *Lyndhurst* :—I wish my view of the case to be distinctly understood. I assume that it was not a special writ, in consequence of there having been only one special writ in the history of the peerage of this country. I do not advert to the *Irish* cases, because they were in *Ireland* and there were peculiar circumstances connected with them; they were within three months of the abdication of King *James*, and they have never been acted upon. I do not think that we are entitled to consider it a doubtful question whether it was a special or a general writ, there having been only one special writ in the history of this country. If then this peerage was created by a general writ and not by a special writ, the case on the part of the claimants is made out; I do not go any further; those are the short grounds upon which I put the question; probably I should have come to the same conclusion even without the *Wentworth* case; but the *Wentworth* case being an authority directly and precisely in point, though it is very generally and loosely reported, I think we may collect from the circumstances attending it, that it was precisely like the present, and that every point now considered with relation to a special writ or a general writ was then considered; that being an authority, confirms me in the opinion I had formed independently of that authority, that the case is made out by the claimant.

Lord *Brougham*:—My noble and learned friend has stated the ground on which I am of opinion, so far as I have read the evidence and attended to the arguments, that this case must be decided. It is exactly upon that ground that I consider this claim to be made out, resting upon this as my basis, namely, your Lordships being satisfied that there was no patent. The argument springs from that as the foundation of the case; but if we were to proceed upon the general presumption that because no person can sit here without being summoned by a writ, and that there must always be a writ, but there needs not always be a patent; that therefore we must presume a writ, that would remove the necessity of disproving the existence of a patent in the first place.

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Lord *Wynford*:—My noble and learned friend misunderstood me: I understood it precisely in the same way as my noble and learned friend near me (Lord *Lyndhurst*), that there being no patent proved, or any trace of those steps having been taken which lead to a patent, I am satisfied that there was not a patent. Then, on the other point, as Lord *Vaux* must have sat here by writ only, there being no patent, I presume, from the numerous cases that there are of general writs, and there having been only one case of a special writ, that this was a general writ, rather than a special writ.

The *Lord Chancellor*:—I am not at all aware what part of my observations could have led to the misunderstanding of my noble and learned friend; for I never intended to express any other opinion than the one which my noble and learned friend has himself expressed: and in order to show the grounds

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upon which I thought this case has been made out, I went laboriously through the evidence adduced at the bar, to show that there had been every possible diligence used to discover the patent, if there had been a patent, or any trace of a patent; and I stated that the conclusion to which I conceive your Lordships will come, would not have arisen but from your Lordships being satisfied that there was no patent; and I stated that I conceived your Lordships were bound upon this evidence, finding evidence of a sitting, and not being able to refer it to any other foundation than a writ, to come to the conclusion that this was an estate created by writ; and having no evidence of a special writ, only one instance of such writ having occurred, to presume that it was by a general and not by a special writ.

The Committee then resolved, and by their Chairman reported to the House, that the said barony was in abeyance between the coheirs of *Henry Lord Vaux*; and that the Petitioner, *George Mostyn*, was one of such coheirs, and that the Petitioner, *Edward Bouchier Hartopp*, was another of such coheirs, with the Earl of *Pembroke and Montgomery*; and, consequently, that the said barony was at his Majesty's disposal. The resolution was, on the 2d of *March* 1837, affirmed by the House, and afterwards presented to his late Majesty. Her present Majesty, by Her warrant dated the 7th of *March* 1838, ordered a writ of summons to be directed to Mr. *Mostyn*, as Baron *Vaux* of *Harrowden*, with the place and precedence belonging to the said ancient barony; and his Lordship took his seat accordingly, on the 12th of the same month, next below Lord *Willoughby de Broke*.

A P P E A L

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FROM THE COURT OF CHANCERY IN IRELAND.

June 1. 7. 11.

August 15.

JOHN HOULDITCH, JAMES HOULDITCH,
EDW. HOULDITCH, and F. STUBBS - } *Appellants.*

HUGH WALLACE, the Marquess of DONE-
GAL, the Earl of BELFAST, JAMES } *Respondents.*
DASHWOOD, and Others - - - }

D., by indenture, in 1799, demised estates in *Ireland*, of which he was seised for life, to trustees for 99 years, on trust to pay him an annuity of 10,000 *l.*, and to apply the residue of the rents and profits in payment of his debts. He soon after received the rents to his own use, excluding a receiver appointed by the Court of Chancery in *England*, in a suit instituted against him and the trustees for carrying the trusts into execution. In 1819 *D.* joined his eldest son *B.*, the tenant in tail, in suffering recoveries of the estates, which, by a deed executed by them in 1822, were limited to trustees, among other trusts, to pay *B.* two annuities during *D.*'s life, with power to *D.* to charge the estates with 217,000 *l.*, and power to *B.* to charge them with 100,000 *l.* In 1832, *B.* assigned his annuities and charge to *W.* to secure the repayment of monies advanced. In 1835, *W.* having filed a bill in *Ireland* against *D.* and *B.*, and others, for enforcing these securities, some of *D.*'s creditors, under the deed of 1799, who, in a suit instituted there in 1828, had obtained the benefit of the suit pending in *England*, with the appointment of a receiver over the trust estates, claimed by their answer to *W.*'s bill, to be first incumbrancers on *D.*'s annuity, to the amount of the rents received by him in breach of the trusts of the deed of 1799; and they filed a bill against him for an account, in 1836.

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Prior charges.
Laches.
Lis pendens.

Held, that, as *D.*'s creditors, in their suits, never sought to attach his annuity before he granted the annuities out of it to *B.*, but confined their proceedings to the carrying of the trusts of the deed of 1799 into execution, *B.* being no party to them, was by the deed of 1822 a purchaser for valuable consideration, without notice; that his two annuities were well charged on *D.*'s annuity of 10,000 *l.*; and *W.*, as *B.*'s assignee, was a prior incumbrancer on it.

THE Marquess of *Donegal* having, on the death of his father in 1799, become seised for his life of divers

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real estates in *Ireland* (subject to certain family provisions), with remainder to his first and other sons in tail male, and being largely indebted to divers persons, in order to provide a fund for payment of his debts, by an indenture, dated the 20th of *April* 1799, demised his said estates to *James Dashwood, John Agnew, William M'George, and William Lyon*, their executors, administrators, and assigns, for 99 years, if he should so long live, upon certain trusts therein mentioned; and among others, upon trust to pay the said Marquess, during his life, the clear yearly sum of 10,000*l.*; and out of the residue of the rents and profits of the trust estates, and the produce of certain shares in the *Lagan* Navigation Company (which were therein mentioned to have been assigned to the trustees), to discharge in the manner therein directed, the demands of such creditors of the Marquess as should bring themselves within the terms, and take the benefit, of the provisions of the said indenture, and accept assignable debentures which the trustees were empowered to issue to them, after investigating their claims, such debentures not to be valid until executed by the Marquess. This indenture was duly registered in *Ireland*, in *August* 1799. The trustees entered upon the performance of the trusts, and, after investigating the claims of many of the creditors, they issued debentures, signed by the Marquess, to such of them as established their claims.

In the year 1802, *Henry Thomas Jones* and *Inigo William Jones*, administrators of *Henry Jones*, deceased, to whom several of the said debentures had been granted, filed a bill in Chancery in *England*, on behalf of themselves and all other creditors of the Marquess of *Donegal* who should come in, &c., against the Marquess and the said trustees, praying, among other

things, for an account of the rents, profits, and proceeds of the trust property, and that the balance, when ascertained, might be applied in discharge of the interest, &c. due to the creditors, and that a receiver might be appointed. By an order made in that cause in *June* 1803, a receiver was appointed of the rents and profits of the estates comprised in the trust deed; and by a decree made in the month of *July* of the same year, it was referred to the Master to take the several accounts prayed by the bill, and it was ordered that the receiver should from time to time pay his balances into the Bank of *England*, to the credit of the cause. The Master, by his report, dated *August* 1804, certified the particulars of the several debts secured by the debentures, proved before him, and which, with interest, he found to be due to the respective creditors.

The Marquess of *Donegal* returned to *Ireland* in 1802, having for several years previously resided in *England*, and in 1803 he entered into the receipt of the rents and profits of the estates comprised in the trust deed, to the exclusion of the receiver and of the trustees. In 1807, *Inigo Jones*, the survivor of the administrators of *Henry Jones*, filed a supplemental bill against the Marquess, who had then come to *England*. The supplemental cause was heard, and a decree was made in 1808, but in consequence of the death of the said plaintiff some time in the year 1809, no further proceedings were had in these causes in *England* until 1821, when Messrs. *Houlditch* and *Stubbs* (the Appellants), who became possessed of a great number of the debentures included in the Master's report, filed a supplemental bill against the Marquess, and the trustees and others, as defendants thereto, stating the said original and supplemental bills, and praying that

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the decrees had therein might be carried into execution for the benefit of the Appellants and the other creditors of the Marquess, and that they might have the benefit of the proceedings in the said suits, and be at liberty to prosecute them. A decree was made in this supplemental suit in 1823, according to the prayer(*a*); and in pursuance of that decree, the Master made a report, dated *July* 1825, which was soon afterwards confirmed; and by a decretal order made on further directions, in *June* 1827, in all the three causes, it was declared that the several creditors in the said reports mentioned, and the Appellants, as assignees and holders of said debentures, were entitled to be paid their respective debts and interest thereof out of the rents and profits of the trust estates; and it was ordered, among other things, that the Master should carry on the accounts, by the original decree directed to be taken against the trustees, against the survivors of them, from the foot of the report of *August* 1804.

In 1828 the Appellants filed their original bill in the Court of Chancery in *Ireland*, against the Marquess and the surviving trustees of the indenture of 1799; and thereby, after stating the several decrees, orders and other proceedings hereinbefore mentioned, and that the receiver appointed in 1803 died in 1825, and that the Marquess of *Donegal* was in receipt of the rents and profits of the trust estates, and was resident in *Ireland*, and that by reason thereof, and because the trust estates were all situated in *Ireland*, they could have no benefit of the said suits, proceedings and decrees therein obtained on behalf of themselves and the other creditors of the Marquess, without the aid of the

(*a*) 1 Sim. & Stu. 491.

Court of Chancery in *Ireland*,—they prayed that they and the other creditors of the Marquess, entitled under the trust deed, might be decreed to have the full benefit of the said several suits instituted in the Court of Chancery in *England*, and that the said several decrees, &c. might be carried into execution by the decree of the Court of Chancery in *Ireland* as far as was necessary, and that a receiver might be appointed and directed to pass his accounts in the suits in *England* before the Master there, and that the Marquess of *Donegal* might be restrained from interfering with the receipt of the rents of the estates comprised in the trust deed, &c. The Marquess put in his answer, and the cause was heard by the Lord Chancellor of *Ireland*, who, by an order dated in *January* 1832, dismissed the bill. That order was reversed upon appeal by this House on the 29th of *July* 1834 (*b*); and by the order of reversal it was declared that the Appellants and the other creditors of the Marquess of *Donegal*, entitled under the decree of the Court of Chancery in *England*, dated the 18th of *June* 1827, ought to have the aid of the Court of Chancery in *Ireland* for carrying into effect the order of the Court of Chancery in *England* for appointing a receiver of the trust estates; and it was ordered to be referred to the Master in the Court of Chancery in *Ireland* to appoint such receiver; and it was further ordered that an injunction should be awarded by the Court of Chancery in *Ireland* to restrain the Marquess from receiving the rents of said estates, and that that Court should give all necessary directions consequential upon the appointment of such receiver and the awarding of such injunction.

That order of the House of Lords was made an order

(*b*) *Ante*, Vol. ii. p. 470; and see Lloyd & G. 82, Cas. temp. Sugd.

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of the Court of Chancery in *Ireland* on the 1st of *August* 1834; and that Court soon afterwards appointed a receiver over the said trust estates; and by a decree dated the 30th *November* 1835, and made on the hearing of the said cause of *Houlditch v. The Marquess of Donegal*, for further directions, payment was decreed out of the rents and profits of the trust estates of the demands of the Appellants and of the other creditors of the Marquess, on account of debts set forth in the reports theretofore made in the Court of Chancery in *England* in *August* 1804 and *July* 1825, and it was referred to the Master to carry on the accounts of the said debts from the report of *August* 1804.

In *December* 1835, the Respondent, *Hugh Wallace*, of *Dublin*, filed his bill against the Appellants and the Marquess of *Donegal* and the other Respondents, stating the trust deed of 1799, and that the Marquess, notwithstanding the provisions therein contained for payment of his debts, continued in great embarrassment, and unable to meet the demands made upon him, and therefore in 1819, when the Earl of *Belfast*, his eldest son and tenant in tail in remainder of the trust estates, attained his age of 21, the Marquess entered into an arrangement with him, which empowered the Marquess to raise a large sum for payment of his debts, and to charge the estates with such sum and with additional portions for his younger children; and it was agreed between them that, subject to these charges, the estates should be re-settled on the Marquess for life, with remainder to the Earl for life, remainder to the Earl's first and other sons in tail male, with divers remainders not material to be stated; that the Marquess and Earl accordingly joined in suffering common recoveries of the said estates, and by deed, dated the 12th of *February* 1819, declared that the same should

enure to such uses as they should jointly appoint in the manner therein mentioned. In pursuance of that power, and by an indenture of seven parts, dated the 28th of *October* 1822, the uses of the said recoveries were declared, and the estates were limited to trustees for 99 years, if the Marquess should so long live, upon trust to permit the Earl of *Belfast*, his executors, administrators and assigns, to receive an annuity or yearly rentcharge of 5,000*l.* during the life of the Marquess, and in case of the Earl's marrying, then a further annuity or yearly rentcharge of 1,000*l.*, both of the then currency of *Ireland*; and in further trust to permit Lord *Edward Chichester*, second son of the Marquess, to receive during the life of the Marquess a yearly rentcharge of 400*l.*; and, subject to these rentcharges and to the said term, the said estates were limited to the use of other trustees for 1,000 years, for raising thereout 217,000*l.* for payment of debts of the Marquess, and subject to both terms, to the use of the Marquess of *Donegal* for life; and after his decease, upon trust for securing to the Marchioness of *Donegal* an annuity of 3,000*l.* for her life; and subject to the said terms and trusts, to the use of the Earl of *Belfast* for life, with remainder to his first and other sons in tail male, &c.: and this indenture contained a power for the Earl of *Belfast* to charge the said estates in manner therein mentioned with 100,000*l.*, to be raised after the death of the Marquess, and applied as the Earl should direct.

The bill further stated, that the Earl of *Belfast* intermarried in *December* 1822, with Lady *Harriet Butler*, and thereupon became entitled to the second annuity or yearly rentcharge of 1,000 *l.*; and being desirous of securing a maintenance for her between the period which might elapse between his own and his father's death, in case he should die before his father,

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the Earl, by indenture dated 30th of *August* 1825, conveyed his said two rentcharges or annuities of 5,000*l.* and 1,000 *l.* to trustees to secure 3,000 *l.* a year to his said wife from his own death, during the joint lives of her and the Marquess; and subject to that provision, in trust for himself, his executors, administrators and assigns. The bill then stated that, in 1832, the Earl of *Belfast*, having occasion to borrow money, entered into an arrangement with the Respondent *Hugh Wallace* and his brother *John Wallace*, for the purpose of obtaining loans of money, and he executed to them his bond, dated the 8th of *September* 1832, in the penal sum of 40,000 *l.*, with warrants of attorney to confess judgment thereon in *England* and *Ireland*; and by indenture of the same date he covenanted with them to repay, with interest at six per cent., such sums as they should lend or procure for him; and he thereby conveyed to them the two annuities of 5,000 *l.* and 1,000 *l.*, and charged the said estates, in pursuance of the power given to him by the indenture of *October* 1822, with the sum of 100,000 *l.*, and directed the same to be raised and paid to the Respondent and *J. Wallace*, with interest at six per cent. from the death of the Marquess of *Donegal*: and it was thereby declared that the said two annuities were assigned in trust, in default of payment of the interest therein covenanted to be paid, that the Respondent and *J. Wallace* should enter into the receipt of the annuities, and pay thereout their expenses and all interest due to them, and pay the surplus to the Earl of *Belfast*, his executors, administrators and assigns: and it was also declared that the charge of 100,000 *l.* was assigned on trust that the Respondent and *J. Wallace* should pay themselves thereout all costs and expenses, and all principal monies and interest

which should be due to them, and that they should stand possessed of the residue in trust for the Earl, his executors, administrators and assigns.

The bill further stated, that on the security of the last-mentioned indenture, this Respondent advanced 7,066*l.* 16*s.* 2*d.*, and *J. Wallace* 764*l.* 6*s.*, to the Earl of *Belfast*; and that in pursuance of an arrangement between them, the Respondent paid *J. Wallace* the said sum of 764*l.* 6*s.*, and *J. Wallace*, by indenture dated the 1st of *July* 1833, released to him all his right and interest in the said annuities and charge of 100,000*l.*; and the Earl of *Belfast* covenanted with the Respondent, that Respondent should forthwith enter into the receipt of the two annuities, and pay thereout to one *William Pirrie* (who was a trustee for the Respondent *Adam John M'Crory*), the sum of 4,000*l.* due to him, and retain to himself the amount of all sums advanced to the Earl specifically on account of the said annuities, with interest thereon; and the Respondent agreed to give the Earl three months' notice before requiring payment of any other principal monies then due to the Respondent, except such sums as were advanced on foot of the annuities, and which sums then amounted to 4,500*l.*: and pursuant to these and subsequent agreements the Respondent advanced to the Earl 3,000*l.*: and the Earl, by indenture dated the 15th of *October* 1834, demised all the estates comprised in the settlement of the 22d of *October* 1822, to the Respondent for 99 years from the death of the Marquess of *Donegal*, if the Earl should so long live, in trust to secure payment of such monies as should be due from him to the Respondent at the death of the Marquess. The bill then stated, that all interest on the Respondent's advances to the Earl, down to the 1st of *September* 1834, were paid,

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but since that date no payment was made to him on account of principal or interest, and that he had since advanced to the Earl large sums as loans; and that on a settlement between Respondent and the Earl, in *June* 1835, the sum of 27,000*l.* appeared to be due to Respondent, and that since that settlement Respondent advanced to the Earl, on the faith of the aforesaid securities, further large sums amounting to 3,844 *l.*, and which, with interest thereon, as well as on the said 27,000*l.*, still remained unpaid, and that 8,500 *l.* of the aggregate amount was advanced by Respondent specifically on foot of the two annuities.

The bill, after stating the proceedings taken by the Appellants, as already mentioned, in their suit in the Court of Chancery in *Ireland*, in 1828, and the appeal to this House, and the consequential orders by which the Appellants had obtained the appointment of a receiver over the whole of the property comprised in the indentures of the 20th of *April* 1799 and the 15th of *October* 1822, and that Respondent applied to them for payment (c), charged that, according to the true construction and effect of them, the said two annuities constituted the first charge on the rentcharge of 10,000 *l.* a year provided for the Marquess by the former of those indentures, and ought therefore to be paid by the receiver in the cause of "*Houlditch v. The Marquess of Donegal*," in preference to all other debts and incumbrances.

The bill prayed that an account might be taken of the monies due for principal and interest, by the Earl of *Belfast* to *A. J. M'Crory* and to this Respondent, on foot of his aforesaid advances; and that, in taking the said accounts, those sums might be distinguished which

(c) See the terms of the applications, *post* 651.

had been advanced by this Respondent expressly on foot of the two annuities of 5,000*l.* and 1000*l.*; and also, that an account might be taken of all monies applicable to the payment of the said annuities received by any of the defendants since the 1st of *July* 1833, or such other day as the Court should name for that purpose; and that such of the defendants as ought, might be ordered to pay this Respondent the amount due to him, together with his costs; and that for this purpose any sums in court, to the credit of the cause of "*Houlditch v. The Marquess of Donegal*," which should appear applicable to the purpose, might be impounded; and that this Respondent, until his said demands should be satisfied, might be declared entitled, during the life of the Marquess, to the receipt of the annuities of 5,000*l.* and 1,000*l.*, on the trusts declared in the aforesaid indentures of 8th *September* 1832 and 1st *July* 1833, and might be put into possession of the same accordingly; and that for the discharge of any arrears due on foot of the said two annuities, the said estates, or a competent part thereof, might be sold for the residue of said term of 99 years; and that, for any balance which should remain unpaid, this Respondent might be declared entitled to resort to the charge of 100,000 *l.*; and that for the purposes aforesaid, all proper accounts might be taken, and necessary directions given; and that a receiver might be appointed over the said estates, or the receiver extended from the cause of *Houlditch v. The Marquess of Donegal*, to this cause, and ordered to pay to this Respondent the full half-yearly gales of the annuities of 5,000 *l.* and 1,000*l.* out of the rents and profits of the said estates, and that this Respondent might have the usual general relief.

The Marquess of *Donegal*, and several other de-

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fendants to the bill, appeared thereto, but did not answer the bill, which, as against them, was therefore ordered to be taken *pro confesso*.

The Earl of *Belfast* and Lord *Edward Chichester* answered separately, admitting the charges in the bill so far as they were severally concerned, and they insisted that their respective annuities of 5,000*l.*, 1,000*l.*, and 400*l.*, secured to them by the indenture of 1822, were charged upon and payable out of the annuity of 10,000 *l.* secured to the Marquess of *Donegal* by the deed of 1799, and prior to all other charges on that annuity.

William M'George, since deceased, and *Thomas Vernon* and *Charles Greenfell*, other defendants to the bill and Respondents in this appeal, answered severally, merely stating their own rights in the premises as trustees in several of the indentures hereinbefore mentioned. *Adam J. M'Crory* also answered, asserting his claims against Lord *Belfast*, and insisting on the benefit of the deed of *July* 1833. The Respondent *James Dashwood* answered separately, setting forth various demands against the Marquess of *Donegal* at the suit of the banking company of *Strange, Dashwood & Co.*, whereof he had been a member, and especially a judgment obtained in the Court of King's Bench in *Ireland* against the Marquess, by *John Towgood* and *John Ingram*, as trustees for the said banking company, in the names of the said *Dashwood*, and of *James Strange* and *Gabriel Tucker Stewart*, since deceased, and of *William M'George*, together with an *Elegit* issued thereon.

Edward Houlditch, one of the Appellants, answered the Bill separately, and declared himself an utter stranger to all dealings between the Earl of *Belfast* and the Respondent *Wallace*. He admitted the deed

of 20th *April* 1799, and claimed a sum of 3,000*l.* as due to himself on foot of debentures held by him, which had been issued under that deed. He denied that the annuities of 5,000 *l.* and 1,000*l.*, limited to the Earl of *Belfast* by the deed of 28th *October* 1822, were the first charges on the annuity of 10,000 *l.* provided for Lord *Donegal* by the deed of *April* 1799, inasmuch as he alleged that the said Marquess had, for thirty years after the execution of that deed, continued to receive and appropriate the rents and profits of the said estates, in derogation of the rights of his creditors claiming under that deed, and in violation of his own covenants and agreements therein contained; and the said Appellant therefore contended that payment of the said annuity ought to be suspended, and that neither the Marquess, nor any person claiming under him, had any right to any payment on foot of it until, out of the yearly accumulations thereof, the amount so withdrawn by the Marquess from his creditors should be made good. He also submitted, that neither the deed of *October* 1822, nor any other arrangement tending to charge the life estate of the Marquess, could be made to affect the rights of creditors claiming under the deed of 1799, without the consent of the trustees named therein. He also relied on the fact, that neither the decree nor order pronounced by this House in the cause of *Houlditch v. Marquess of Donegal*, on the 29th of *July* 1834 (*d*), nor the decree of the Court of Chancery of the 30th *November* 1835, pronounced in the said cause on the hearing for further directions, contained any directions for payment of the annuity of 10,000*l.* to the Marquess, as being a fact conclu-

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sive against the right of any person claiming under the Marquess to any portion of the said annuity; and he likewise relied on the refusal by the Chancellor of *Ireland*, on the 11th of *January* 1836, upon a motion of the Marquess, to vary the notes of the said decree of the 30th *November* 1835, by inserting a specific direction for the payment of the said annuity to the Marquess.

The Appellants, *John* and *James Houlditch*, and *Francis Stubbs*, put in a joint answer to the bill, and claimed a sum of 50,000 *l.* and upwards, as due to them as holders of debentures under the deed of 20th *April* 1799. Their answer was, in other respects, the same with the answer of *Edward Houlditch*. On the 31st of *December* 1836 they filed a supplemental bill in the Court of Chancery in *Ireland* in the cause of *Houlditch v. the Marquess of Donegal*, making the Respondent *Wallace* a party defendant thereto; and the bill, after stating and charging to the effect of the statements, &c. in the above answer of *Edward Houlditch*, prayed an account of the bygone rents received by the Marquess above the annuity of 10,000 *l.*, and payment of the surplus into court for the benefit of his creditors in the cause of *Houlditch v. The Marquess of Donegal*, and that in the meantime payment of the annuity be suspended. That cause has not yet been brought to a hearing.

The Lord Chancellor of *Ireland* having heard the present cause upon certain admissions, including the various deeds, decrees, and orders before mentioned, by his decree dated the 5th of *June* 1837, declared the annuities of 5,000 *l.*, 1,000 *l.*, and 400 *l.*, limited to the Earl of *Belfast* and Lord *Edward Chichester* respectively by the indenture of settlement of the 28th of *October* 1822, to be well charged upon and payable

out of the annuity of 10,000*l.* reserved to the Marquess of *Donegal* by the indenture of the 20th of *April* 1799, and to be well charged accordingly upon the trust-term of 99 years by said last-mentioned indenture created, and to be now payable, under the trusts thereof, out of the rents and profits of the estates comprised in that trust-term; and it was referred to the Master to take an account of the sums then due on foot of the annuity of 10,000*l.*, which had accrued since the filing of the bill in this cause, and to inquire and report as to the funds properly applicable to discharge the same; and also an account of the sums then due and owing on foot of the two annuities of 5,000*l.* and 1,000*l.* limited to the Earl of *Belfast*; and also the sum then due to Lord *Edward Chichester*, on foot of the said annuity of 400*l.* limited to him; and also an account of the sums then due to *Hugh Wallace*, for principal and interest on foot of the said several deeds of the 8th of *September* 1832, the 1st of *July* 1833, and the 15th of *October* 1834; and also an account of the sums then due and owing to *A. J. M'Crory*, for principal and interest on monies advanced by *W. Pirrie*, his trustee, to the Earl of *Belfast*: and in taking the accounts aforesaid, the Master was to distinguish the sums due for principal and interest on the advances made by *Hugh Wallace* to and for the use of the Earl of *Belfast* specifically on foot of the annuities of 5,000 *l.* and 1,000 *l.*: and his Lordship referred it to the Master to take an account of all incumbrances specifically charged upon the annuity of 10,000*l.*, and of the incumbrances specifically charged upon the annuities of 5,000 *l.* and 1,000 *l.*, if any, prior to the plaintiff's demand thereon respectively, and of the sums then due and owing for principal and interest upon foot of

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such incumbrances respectively: and the plaintiff not having objected thereto, his Lordship declared this decree to be without prejudice to the rights of *J. Dashwood*, as surviving *elegit* creditor of the Marquess of *Donegal*, and claimant upon the sum of 5,428*l.* 5*s.* 7*d.* Government old Three-and-a-half per cent. stock, then standing to the separate credit of *John Stephenson Salt*, the receiver of the outstanding assets of *J. Strange*, *J. Dashwood*, and *W. M'George*, in the original and supplemental causes of *Houlditch v. The Marquess of Donegal*, under an order of the Court, dated the 31st of *January* 1837.

From this decree, and also from an order dated the 15th of *June* 1837, for extending the receiver in the cause of *Houlditch v. The Marquess of Donegal* to the cause of *Wallace v. The Marquess of Donegal*, the Messrs. *Houlditch* and *Stubbs* appealed, praying that the decree and order may be reversed, and the bill dismissed with costs, as against the Appellants.

Mr. *Pemberton* and Mr. *Bethell*, for the Appellants:—The real question in this appeal is, whether an assignee of a *chose in action* is to take the rents of Lord *Donegal's* estates, in preference to creditors for whose benefit those estates were demised to trustees, by the indenture of 1799. The Appellants are holders of assignable debentures issued in pursuance of the trusts of that indenture, and the particulars of the debts secured by them were proved before the Master, and comprised in his report made in *August* 1804, under the decree of reference in the English cause of *Jones v. Lord Donegal*. The receiver appointed over the trust estates by an order in that cause, was obstructed and actually turned out by Lord *Donegal*, who, notwithstanding the subsequent orders made for

continuing the receiver, did himself receive all the rents and other profits, from 1802 to 1834, in violation of those orders and of the deed of trust; so that in 1822, when he granted the two annuities to Lord *Belfast*, he was indebted to the trust estate in a sum exceeding 200,000 *l.* for rents and profits received by him over and above his own annuity of 10,000 *l.* That annuity payable to Lord *Donegal* was liable to the debenture creditors until his debt to the trust estate was discharged. Was the assignee of the annuities granted out of Lord *Donegal's* annuity to be held to be in a better situation than himself? Was Lord *Belfast* or Mr. *Wallace*, assignees of a *chose in action*, to take a greater interest in that annuity than Lord *Donegal* had in it? The order of this House in *July* 1834, reversing a former decree of Lord *Plunket*, in the cause of *Houlditch v. Donegal*, declared, in effect, all the rents of the trust estates to be subject to the debts due to the Appellants and the other debenture creditors, for it declared “that the Appellants and the creditors of Lord *Donegal*, entitled under the decree of the Vice-Chancellor of *England*, of the 18th of *June* 1827, ought to have the assistance of the Court of Chancery in *Ireland* for carrying into effect the orders of the Court of Chancery in *England*, whereby a receiver was appointed over the estates comprised in the trust deed,” and “that the tenants of the said estates were to attorn and pay their rents, as well those in arrear as those growing, &c., to such receiver:” and “it was further ordered that an injunction should be awarded by the Court of Chancery in *Ireland*, to restrain Lord *Donegal* and his agents from receiving or interfering in the receipt of the rents of any part of the estates comprised in the trust deed.” That order was made an order of the Court of Chancery

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in *Ireland*, and a receiver was accordingly appointed on the 8th of *August* 1834; and by the decree of that Court, made in *November* 1835, upon further directions, the Appellants were declared "entitled to be paid their debts in full, out of the rents of the trust estates, pursuant to the English decree of the 18th of *June* 1827, and the order of this House; and it was referred to the Master to carry on the accounts of the sums due to the Appellants from the report in *Jones v. Lord Donegal*, dated *August* 1804." Before this last decree was drawn up, a motion was made on behalf of Lord *Donegal* for amending the same, by inserting a declaration that he was entitled to be paid by the receiver the annuity of 10,000*l.*, but the Lord Chancellor of *Ireland* refused that application with costs. The decree afterwards made by his Lordship, and which is the subject of this appeal, was directly opposed to his former orders and decrees, and to the order of this House.

The proper course for Mr. *Wallace* to pursue was, instead of filing a bill, which was wholly irregular, to apply to the Court of Chancery in *Ireland*, for an order to be examined *pro interesse suo*. The Court of Chancery in *Ireland* having been in possession of the trust estates by its receiver, ought not to allow that possession to be disturbed by an adverse suit praying another receiver. The object of the former suits on behalf of the debenture creditors, revived and continued by the Appellants, was to execute the trusts of the deed of 1799. Mr. *Wallace* filed his bill as assignee of Lord *Belfast's* annuities, claiming payment of them out of the annuity secured to Lord *Donegal* by the same trust deed. Had he followed the usual course of practice, and come in under the decree in the Appel-

lants' suit, the relief sought by his bill could not be granted. The institution of a separate suit by him was designed to escape from the effect of the proceedings in the former suits. The Lord Chancellor of *Ireland* held, by this decree, that Lord *Belfast* or Mr. *Wallace* was not bound by those proceedings, or affected with notice of them, as they were proceedings *inter alios*, and in a foreign jurisdiction : but his Lordship had, by his own orders, and decree on further directions, in the Appellants' suit in 1835, made the previous orders of the Court of Chancery in *England*, and of this House, available in *Ireland*, where the trust estates were situated, and where Lords *Donegal* and *Belfast*, and Mr. *Wallace*, were residing.

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By the order of this House, in *July* 1834, the rents of the estates were declared to be bound by the orders made in the original and supplemental causes in this country, from the appointment of the receiver in 1803. It could not be contended that while the Court in *Ireland* was carrying into effect the orders made here, there was no *lis pendens*, of which Lord *Belfast* and Mr. *Wallace* were to take notice. It was their duty, before they dealt with Lord *Donegal's* annuity, to make some inquiry of the trustees, who had the payment of it, by which they could have discovered that it was largely in debt to the trust fund, and that no part of it was payable until that debt was satisfied. The trusts of the deed of 1799 were not, as the Lord Chancellor of *Ireland* construed it, first and in all events, to pay Lord *Donegal* 10,000 *l.* a year, but that the trustees should receive all the rents and profits for the purposes of the trusts, and out of them pay the Marquess 10,000 *l.* a year. But if he, in violation of the trust-deed, and in contempt of the orders of Court, received more than that sum, the

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trustees were entitled to retain his annuity until the debt due from him to the trust, in respect of the rents received and withheld by him from 1803 to 1834, was fully discharged. In *Waring v. Coventry* (*f*), a case in which a tenant for life failed to keep down the interest of a charge on his estate, and the trustees of a term, created for the purpose of that charge, raised a larger sum from the estate, to the prejudice of the remainder-man, the Master of the Rolls (Sir *J. Leach*) said, "As tenant for life, he was bound to keep down the interest; and having taken from the estate more than he was entitled to, what may hereafter accrue to him in respect of his life estate, must go to reimburse the estate for the excess of his receipts, and does not form a mere personal demand against him. His assignees stand in the same situation as the defendant himself (the tenant for life), and can claim only what he could equitably claim." That case was quite applicable, and bore strongly on this.

The case of *Priddy v. Rose* (*g*) was still stronger. The plaintiffs there, annuitants of one *Hunt*, who, as a security for payment of the annuities, assigned to them, among other things, the dividends of certain funds to which he was entitled for his life under his marriage settlement, filed their bill against the trustees of that settlement, for the dividends that accrued due on the funds. The trustees answered that, although by the settlement *Hunt* was entitled to the dividends for his life, yet by the same settlement he covenanted to pay them 4,000*l.*, to be laid out in like trusts as the other funds; that as he never performed that covenant, they had a right to stop the dividends to be applied to make good the sum of

(*f*) 2 Myl. & K. 406.

(*g*) 3 Meriv. 86; see p. 104.

4,000 *l.* which he ought to have paid them. The Master of the Rolls (Sir *W. Grant*), in giving his judgment on that point, said, "As to the question between the plaintiffs and the trustees, it arises on the following facts:—*Hunt's* marriage settlement was in *April* 1795. The 4,000 *l.* became payable in four years afterwards. It does not appear that the trustees ever made any application for the payment of that money. The first annuity was granted in 1802, the others in 1806; *Hunt* absconded in 1810, down to which time he had received the dividends from the trustees, and paid the annuities as they became due. No notice had ever been given to the trustees of the assignment of the dividends until after *Hunt* had absconded: the question is, whether the dividends can be stopped. See how the case would have stood between the trustees and *Hunt* himself. I apprehend it to be clear, that he could not have claimed a benefit under the settlement without making good his part of it. The trustees might give him what credit they chose, subject to their responsibility to their *cestui que trusts*; but they might, at any time after the 4,000 *l.* became due, have stopped the dividends, if the money was not paid. Supposing he had become a bankrupt, the trustees would have this equity as against the assignees, as was determined by Lord *Thurlow* in *Ex parte Mitford*." His Honor, after stating the facts of that case, and the order made in it(*h*), which bears closely on this case, proceeds thus: "If as against *Hunt* the trustees had the equity of stopping the dividends to make good the debt of 4,000 *l.*, could he, by this act, without their knowledge or consent, deprive them of that equity? The assignee for the annuitants taking no legal interest in the funds, could only take subject to the same

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(*h*) 3 Meriv. 105.

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equity to which the assignor was liable." It was on the principle so clearly laid down in those three cases that this appeal has been brought. The principle was constantly acted upon in bankruptcy; *Smith v. Smith* (i); and it was the duty of this House to carry it out in this case.

There are now two inconsistent decrees on the records of the Court of Chancery in *Ireland*. The orders made in pursuance of the declaration of this House in the former appeal, and the decree on further directions in 1835, in the cause of *Houlditch v. Lord Donegal*, directed, in effect, that his debenture creditors be first paid out of the rents; but the decree now appealed from, without altering the former, expressly declared that not these, but other creditors, assignees of Lord *Donegal's* annuity, assignees of a *chose in action*, should be paid before them, to the extent of 6,000*l.* a year; so that the declaration of this House in *July* 1834, and the orders consequential on it, must be null or this decree reversed.

[The *Lord Chancellor*: The decree only declares that the annuities of 5,000*l.* and 1,000*l.* are well charged on the annuity of 10,000*l.* It does not direct any payment, but it directs an inquiry as to priority of demands. Can there be any doubt that the two annuities are well charged on Lord *Donegal's* annuity? How are the Appellants prejudiced by the decree, or prevented from going before the Master, and showing, if they can, that they are prior incumbrancers? They contend that no part of the 10,000 *l.* ought to be paid to Lord *Donegal* until their demands are satisfied. What part of the decree interferes with them?]

The pleadings explain the decree. The Respondents'

(i) 1 Younge & C. 338.

bill, after stating the proceedings in the Appellants' suits in *England* and in *Ireland*, charged that "he had applied to the Appellants to pay him, or permit him to receive, out of the rents and profits of the premises collected by them, so much as would suffice to cover his demands, or at least to discharge the arrears of interest due to him, and also the sums advanced by him specifically on foot of the said two annuities; and he required them, for the future, during the life of Lord *Donegal*, to pay him (the Respondent) the amount of the two annuities of 5,000*l.* and 1,000*l.*, to the receipt whereof he claimed to be entitled in preference and priority to the Marquess, the Earl of *Belfast*, or the Appellants, or any other creditor claiming under the decree in the cause of *Houlditch v. The Marquess of Donegal*." The prayer of the bill was to the same effect, and the decree, in conformity with the charges and prayer, is, that "the annuities are now payable out of the rents and profits."—[The *Lord Chancellor*: Might not every word of this decree stand consistently with the Appellants' rights?]
—Not consistently with the declaration that "the annuities are now payable out of the rents and profits of the estates comprised in the trust indenture." The decree is also at variance with the forms of the Court. The Respondent ought, instead of filing a bill, to have gone in under the former decree; but by this course of proceeding he has got rid of all the orders made in favour of the Appellants. The decree was also contrary to the spirit, if not to the letter of the declaration of this House in *July* 1834, to the decree and orders of the Court of Chancery in *Ireland* consequential on that declaration, and to an order subsequently made by the Lord Chancellor of *Ireland*, by which he refused a motion

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made on behalf of Lord *Donegal* to insert in the decree a declaration that the 10,000*l.* a year should be paid to him by the receiver. Mr. *Wallace*, the assignee of a *chose in action*, ought not to be put in competition with the creditors of Lord *Donegal* under the trust-deed of 1799; his claim, arising subsequently, should be postponed until theirs shall be satisfied. He had ample security for the ultimate payment, in the assignment of Lord *Belfast's* charge of 100,000 *l.* to be raised out of the estates after Lord *Donegal's* death; but if that event should happen before the Appellants are paid, their chance of payment will be gone for ever.

Mr. *Tinney* and Mr. *Knight Bruce* (*k*) (Mr. *Purvis* with them), for the Respondent *Wallace*:—There is no question of a *chose in action* in this case. It has never been held that an interest charged upon land could not be effectually assigned. It may pass by lease and release, and in Comyn's Digest, where the doctrine is laid down, rents and annuities are given as instances of things lying in grant. By the deed of 1822, executed for the purpose of providing an immediate income for Lord *Belfast*, in pursuance of the agreement entered into previous to the recoveries in 1819, Lord *Donegal's* interest in the annuity of 10,000 *l.*, reserved to him by the deed of 1799, was passed to Lord *Belfast* to the extent of 6,000 *l.* a year, and to that extent is Mr. *Wallace* a first incumbrancer on it, as assignee of Lord *Belfast*. The necessary legal effect of the deed of 1822 was to charge the annuities of 5,000*l.* and 1,000 *l.* upon every interest that Lord *Donegal* had in the pre-

(*k*) Mr. *Knight* took the addition of *Bruce* in the autumn of 1837.

mises. A conveyance of the fee-simple in property purports to convey all the interest the party has; therefore, if he has an inferior interest, can it be doubted that it will pass under such a conveyance? and a derivative chattel interest passes as well as the fee, *Burton v. Barclay* (l). The recoveries did not affect Lord *Donegal's* interests in the estates under the trust deed of 1799. In *Cruise on Recoveries*, p. 316, it is stated that "no estates or interests are barred by a common recovery but those which are subsequent in point of limitation to the estate of which the recovery is suffered, for all the interests precedent remain as they were before."

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It has been argued, on behalf of the Appellants, that no property can be assigned without being subject in the hands of the assignee to all the equities to which it was subject before assignment. That argument is answered by several cases of unquestioned authority. In *Mitford v. Mitford* (m), which was a claim by the assignees of a bankrupt, who was entitled in right of his wife, against the surviving wife, Sir *Wm. Grant* held that there was a distinction between a particular assignment for valuable consideration and an assignment by operation of law, as in bankruptcy. "In equity," his Honor observes, "a distinction seems to have been made between a voluntary assignment and an assignment for valuable consideration. The wife surviving is not bound by his (the husband's) voluntary assignment. But by an assignment for valuable consideration, it is said she is bound both as to *choses in action* and equitable interests. Supposing this doctrine to be established, the question then would be, whether an assignment

(l) 7 Bingh. 745.

(m) 9 Ves. 87; see pp. 97-99.

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in bankruptcy is of the same nature, and produces the same effect, as an actual assignment for valuable consideration. It may seem strange that a man should, in any way, be able to transfer to another a larger or better interest than he has in himself. The interest he has in her *chose in action*, or equitable interest, is only a right or power to reduce it into possession. But what is supposed to pass to an assignee for valuable consideration, is the absolute right to the property wholly freed from her contingent right by survivorship. If such be the rule, it is the favour a Court of Equity shows to such a purchaser that operates, as in many cases it does, to put him in a better situation than the party from whom he derives his title." There are two other cases on the same subject, equally applicable to the present case; *George v. Milbank* (n), which cannot be distinguished in its circumstances from this, and *Geary v. Beaumont* (o), which was the case of a specific legacy given to an executor, who afterwards committed a *devastavit*, and became bankrupt. The subject of the specific bequest was sold by his assignees, and it was held that the produce in their hands was not specifically liable to make good the *devastavit* to the parties beneficially entitled under the will. Sir *W. Grant*, Master of the Rolls, there said, "At first sight, it appeared a strong proposition that an executor, being a debtor to the estate, could take any part of it, &c. and it was not pretended that the assignee could stand in a better situation." But his Honor, after consideration, said, "This specific bequest could not be applied to satisfy the *devastavit*; for that, when no debts are due from the testator, the Court has nothing to do with the

(n) 9 Ves. 190.

(o) 3 Meriv. 431.

specific legacies, and must confine its administration to the effects not specifically bequeathed. That this was not the case of an executor applying to the Court for its assistance in the administration, but that of a hostile application against the executor; and he therefore held that the assignees were entitled to the produce of the leasehold estate in question." That case also was not distinguishable from this, in which Lord *Donegal* being entitled to a specific interest, and, after committing a *devastavit*, as the Appellants allege, assigned his interest. The facts in *Waring v. Coventry*, *Priddy v. Rose*, and *Smith v. Smith*, were essentially different from the present case.

The Earl of *Belfast* was a purchaser of the annuities of 5,000 *l.* and 1,000 *l.* for valuable consideration, and he could not be affected by a suit pending *inter alios* in a court of foreign jurisdiction respecting a subject-matter quite different from the annuity of 10,000 *l.* secured to his father; a suit which was in no way framed to affect that annuity. All that was claimed by the suits instituted in *England* was to enforce the trusts of the deed of 1799; and the suit in *Ireland* was instituted for the purpose of making the Court there subsidiary to the proceedings taken here. The order of this House on the appeal in *July* 1834, made an order of the Court of Chancery in *Ireland*, did not give the Appellants any relief that their bill did not pray. Lord *Donegal's* creditors, under the deed of 1799, framed their proceedings both in *England* and *Ireland* so as to procure an execution of that deed, which necessarily included the preservation of the Marquiss of *Donegal's* primary right to the maintenance of 10,000 *l.* a year, and never sought any relief against him in regard to any receipt by him of bygone rents and profits. Lord *Belfast* being no

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party to any of the proceedings anterior to Mr. *Wallace's* bill, was in no way bound by them.

The objections made in respect to the form of proceeding are disposed of by the case of *Angel v. Smith* (p). Lord *Eldon* there said, "Where sequestrators are in possession under the process of the Court, &c., their possession is not to be disturbed, even by an adverse title without leave; upon this principle, that the possession of the sequestrators is the possession of the Court, and the Court being competent to examine the title, will not permit itself to be made a suitor in a Court of Law, but will itself examine the title; and the mode is by permitting the party to come in to be examined *pro interesse suo*." But although an ejectment is not to be brought against sequestrators, or receivers, as to whom the same rule has obtained, it is quite new to say that a person cannot file a bill for relief because a receiver has been appointed in a cause to which he was not a party. The Respondent did not ask to disturb the receiver, and the decree did no more than extend the receiver to the Respondent's suit. In an application to be examined *pro interesse suo*, the Respondent could not bring all parties interested in the subject matter before the Court, and their rights could not therefore be adjudicated.

The bill filed by the Appellants in *Ireland* in *December* 1836, after the Respondent had filed his, might have been brought to hearing with his, which would be the proper course, but the Appellants did not make any application for that purpose. Their bill prayed for an account of bygone rents against Lord *Donegal*, and that the 10,000*l.* reserved to him might be paid

into court. Every species of equity prayed for by their bill is reserved in the decree now appealed against. Whatever may be the merits of that decree, most unquestionably the order for extending the receiver is right, and the appeal against it is litigious. The Appellants did not assert their equity to arrest Lord *Donegal's* annuity until after the Respondent filed his bill. That annuity was left free and untouched through the various proceedings in the Courts of both countries, although his interference with the receipt of the rents from 1803 was well known to all the parties. The order of injunction made in that year proceeded on the fact that he was receiving the rents to the exclusion of the receiver. The supplemental bills filed in 1807 and 1821 did not complain of his interference. In the years 1819 to 1822 the dealing between him and Lord *Belfast* took place. There was no proof that Lord *Belfast* then had notice of the *English* suit, and even if he had notice, that could not prevent him from purchasing the annuity reserved to the Marquess, and which was never the subject of that suit. All the proceedings not only in that, but also in the suit instituted by the Appellants in *Ireland* in 1827, aimed at nothing beyond an account against the trustees. The appeal against both decree and order, as against Mr. *Wallace*, ought to be dismissed with costs.

With respect to the Respondent *Dashwood*, the decree was declared to be without prejudice to his rights as surviving *elegit* creditor of Lord *Donegal*, and a claimant upon a sum of 5,428 *l.* three-and-a-half per cent. stock standing to the separate credit of *John Stevenson Salt*, the receiver of the outstanding assets of *Strange, Dashwood & Co.*, in the cause of *Houlditch v. Lord Donegal*, under an order dated in

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January 1837. The case of Mr. *Dashwood* was this:—In 1799, *Walwyn, Strange & Co.*, a banking firm in *London*, became the bankers of Lord *Donegal*, and advanced him monies, for securing which he executed his bond, with warrant of attorney, upon which the bankers entered up judgment for 16,000*l.* in the Court of King's Bench in *England*. Upon the death of Mr. *Walwyn* in 1800, and the withdrawal of other partners, a new firm was formed, by the style of *Strange, Dashwood & Co.*, to whom the debts and effects of the old firm were transferred. *Strange, Dashwood & Co.* stopped payment in 1803, and their estate and effects were assigned to *John Ingram* and others, as trustees for their creditors. These trustees brought an action in 1825 against Lord *Donegal* in *Ireland*, on the judgment entered up in *England*, and they obtained a verdict and judgment thereon for 5,089 *l.* 16 *s.* 2 *d.*, British currency, which was afterwards reduced by 1,250 *l.* For the balance of 3,792 *l.* 16 *s.* 2 *d.*, the plaintiffs in the action sued out a writ of *elegit* in 1835, directed to the sheriff of the county of *Antrim*, who, after inquiries duly had, extended in their behalf a moiety of Lord *Donegal's* annuity of 10,000 *l.* The receivers in the equity suits having paid into court considerable sums in respect of this annuity, a sum of 5,428 *l.* three-and-a-half per cents, part thereof was ordered to be transferred for the *elegit* creditors to the separate account of Mr. *Salt*. This decree reserved their claim on Lord *Donegal's* annuity, in respect of that sum, and it was submitted that the decree in that respect also was right(*q*).

(*q*) Mr. *Wood* appeared as Counsel for Mr. *Dashwood*; but as he had an interest in supporting the decree, as well as Mr. *Wallace*, the Counsel for the latter undertook, by desire of the House, to open *Dashwood's* case with their own.

Mr. *Pemberton*, in reply :—If your Lordships dismiss this appeal, you will do so only on the ground that the decree decides nothing against the Appellants; and in that case it is submitted that your Lordships will direct the decree to be modified, as without some alteration the Appellants may be prejudiced by it; for should Lord *Donegal* die before their rights shall be established, they will be gone altogether. The appeal is certainly as much against the saving in the decree in favour of Mr. *Dashwood* as against Mr. *Wallace*, for the Appellants contend that the whole annuity reserved to Lord *Donegal* was absorbed by the debt he owed the trust. Should your Lordships' decision proceed on the merits, it will dispose of Mr. *Dashwood's* case as well as of Mr. *Wallace's*. If he had followed the usual course of applying to be examined as to his claim under the decree in the Appellant's suit, or filed a supplemental bill with leave of the Court, the rights of all parties would be disposed of. The Appellants contend that they and the other debenture creditors under the deed of 1799, have a right to be paid out of Lord *Donegal's* annuity the amount of the rents received by him, in violation of that deed, and that they have the same rights against all persons deriving subsequently under Lord *Donegal* as they have against himself. They further contend that he could not assign that annuity, and that the assignees had notice of its liability to the debenture creditors; and they also submit that this decree concludes these rights, and that it is inconsistent with the former decrees and orders of the Court, by which they were declared to be entitled to payment out of all the rents. Is there any case in which such purchasers as Lord *Belfast* and Mr. *Wallace* were held to have a prior right to relief before

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prior parties who have a like title? Between equitable purchasers, priority in time is priority in equity. Had not the Appellants and Lord *Donegal's* other creditors a right in 1822 to say that he, a debtor to the trust estate, should not have any payment out of it until the creditors were paid. *Wallace* was well aware in 1822 of the liability of Lord *Donegal's* estate to his creditors. The trustees were, under the deed of 1799, to be owners of the estates to all intents and purposes, accountable only for the rents and profits. Lord *Donegal's* interest was available only in a court of equity. His right was not in strictness a rentcharge, but a covenant with his creditors to receive so much from them. The creditors' rights extend to the persons claiming under Lord *Donegal*, because these had notice of the creditors' claims. The trustees were not chargeable after the receiver was appointed, nor is the receiver accountable, because Lord *Donegal* put him out of possession, and he being a party to our suit, was accountable to the Court without any new bill.

No answer was given on the other side to the case of *Priddy v. Rose*, which is identical with this, nor to *Waring v. Coventry*, which differed from *Priddy v. Rose* only in this, that the subject of the former was real estate, and of the latter personalty. In addition to these cases, he referred to *Purdew v. Jackson (r)*.

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The *Lord Chancellor* :—My Lords, this is an appeal from a decree of the Lord Chancellor of *Ireland*, of the 5th of *June* 1837, by which it was declared that two annuities of 5,000 *l.* and 1,000 *l.*, limited to Lord *Belfast*

by an indenture of the 28th of *October* 1822, and an annuity of 400 *l.*, limited by the same deed to Lord *Edward Chichester*, were well charged and payable out of an annuity of 10,000 *l.* per annum, reserved to Lord *Donegal* by a deed of the 20th of *April* 1799, and to be well charged accordingly upon the trust term of 99 years created by the last-mentioned indenture, and to be now payable under the terms of that indenture, out of the rents and profits of the estates comprised in that term. It was then referred to the Master to take an account of what was due upon the foot of the annuity of 10,000 *l.*, which had accrued since the filing of Mr. *Wallace's* bill. An account was also directed of what was due to Mr. *Wallace* and other persons claiming a derivative interest in the annuities as settled upon Lord *Belfast*. The Master was also directed to take an account of all incumbrances specifically charged upon the annuity of 10,000 *l.* per annum; and this is the decree appealed from. The order appealed from was a consequential order to this decree, directing the receiver already appointed in another cause of *Houlditch v. Lord Donegal*, to be extended to the cause of *Wallace v. Houlditch*, and that the money that he might pay in should be placed to the credit of both causes.

The new cause of *Houlditch v. Lord Donegal* is a suit by certain creditors of Lord *Donegal*, which has not yet been heard, but which has for its object to make Lord *Donegal* account for all the rents received by him from certain trust estates (comprised in the deed of 1799), from the year 1803 till the appointment of the receiver in 1834, after giving him credit for the annuity of 10,000 *l.*; and that what shall be found due from him upon that account may be paid out of the future payments of the annuity of 10,000 *l.*; and

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that Lord *Donegal*, and all persons claiming through him, may be restrained from receiving any part of that annuity until what shall be so found due from Lord *Donegal* shall have been paid.

The bill in *Wallace v. Houlditch* not only prayed that the title of Lord *Belfast* and those claiming under him, against the annuity of 10,000 *l.*, might be established, but also for payment thereof out of the estates, and out of certain sums of money which had arisen therefrom. But the decree does not contain any directions for payment, but only declares the title to the annuities of 5,000 *l.* and 1,000 *l.*, and 400 *l.*, to be good as against the annuity of 10,000 *l.* It does not appear that the decree concludes any question as to whether these three annuities constitute a prior charge upon the 10,000 *l.* a year; and indeed the Master is directed to inquire what specific charges there are upon that annuity; so that there is nothing in the decree to prevent the plaintiffs in the cause of *Houlditch v. Lord Donegal* from establishing a prior equitable lien upon this annuity of 10,000 *l.* The real question argued at the bar does not seem, therefore, *necessarily* to arise; but it appears to have formed the subject of the judgment of the Lord Chancellor of *Ireland*, and being one of the highest importance to the parties, your Lordships cannot think it right to dispose of this appeal without considering that question.

Now, my Lords, two points arise for consideration: first, whether the annuities of 5,000 *l.* and 1,000 *l.*, and 400 *l.*, are charged upon and payable out of the annuity of 10,000 *l.*; secondly, if they are, then whether *Houlditch*, and the other creditors of Lord *Donegal* claiming under the trust-deed of the 20th of *April* 1799, and debentures granted in pursuance

thereof, are entitled, as against those three annuities, to arrest the future payment of the 10,000*l.* to satisfy a debt alleged to be due from Lord *Donegal* to the trust, which debt consists of the amount of rents received by him from the trust estates, which, it is alleged, ought to have been applied in execution of the trust.

It appears that in 1799, Lord *Donegal* was tenant for life of the estates in question, and being largely indebted, he executed a trust-deed, dated 20th of *April* 1799, by which he granted a term of 99 years, determinable upon his death, to trustees, upon trust, first, to pay to him 10,000 *l.* a year for life; secondly, to invest the surplus rents to accumulate and constitute a trust fund. The trustees were to have power to investigate Lord *Donegal's* debts, and to arrange with the creditors, and at their discretion to grant debentures, and they were to apply the fund in discharge of the several arrangements so to be entered into with the creditors. The Appellants claim under debentures granted in execution of the trusts of that deed.

It appears that, in 1802, the representatives of *Henry Jones*, a debenture creditor, filed a bill in *England*, praying for an account against the trustees, of what they had received under the trust, and for the application of the amount in discharge of the debts, and for a receiver; and in 1803 a receiver was appointed, and by the decree in that cause, dated the 27th of *July* 1803, the account as prayed was directed against the trustees, and what should be found due from them was directed to be applied in payment of the creditors, and the receiver was continued. Lord *Donegal* was named as a defendant to that cause, but he was absent in *Ireland*, and was not in fact a party to it; but having come to *England* in 1807, a sup-

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plemental bill was filed against him, and by an order of the 17th of *August* 1807, he was restrained from receiving any of the rents of the trust estates, and the receiver was directed to use his name as well as that of the trustees, in getting possession of the rents; and by the decree in that supplemental cause, the decree in the original cause was pronounced as against Lord *Donegal*, and the injunction and the receiver were continued. Lord *Donegal* did not appear upon the hearing, but the decree was made absolute against him on the 22d of *June* 1808. Nothing further was done in that suit until after the time at which the title to the annuities of 5,000 *l.*, 1,000 *l.*, and 400 *l.*, arose. It is, therefore, most material to consider the situation of the parties at that time. There was not at that time any suit or decree calling upon Lord *Donegal* to account for any rents, and although it is alleged that Lord *Donegal* had kept possession against the receiver from 1803, when he was appointed, the supplemental bill filed against Lord *Donegal* in 1807, did not pray any account of rents received against him. There was indeed an injunction on the 17th of *August* 1807, restraining him from receiving any rents, and a direction for the receiver to obtain possession of the estates; but that order does not appear to have been acted upon, for, except a bill filed in *Ireland* in 1809, which was not prosecuted, nothing was done to carry this order into effect prior to the granting of the three annuities in question. At the time Lord *Donegal* agreed to grant the annuities, claimed by Mr. *Wallace*, that is in 1819, the claim of the creditors as now insisted upon was this, that Lord *Donegal* having received rents, notwithstanding the injunction in 1807, might have been compelled to account for such rents; and that for compelling payment of the overplus of

the amount of such rents, beyond his 10,000 *l. per annum*, a Court of Equity might have arrested the future payment of the 10,000 *l. per annum*. But that equity had existed since 1807, without any attempt to enforce it; and if under such circumstances, Lord *Donegal*, in 1819, agreed to assign, and in 1822, for a valuable consideration, assigned part of his 10,000 *l.*, the question is, whether such equity can in 1836 be enforced against the purchaser of part of that 10,000 *l. per annum*; that is, 29 years after it had commenced, and 19 years after the purchaser's title had accrued.

Whatever equities the creditors may have had against Lord *Donegal's* annuity of 10,000 *l.*, it is clear that such only as existed at the time of the assignment of part of that annuity in 1819 and 1822 could be enforced against the purchaser, for from that time the purchaser from Lord *Donegal* was the proprietor of so much of the annuity as was assigned. If any such equity existed, it must have been founded upon the suit in this country, in which no proceedings were had after 1808. Laches will, in most cases, bar an equity, particularly against a purchaser, and in this case no steps were taken to enforce that equity against the growing payments of the 10,000 *l.* a year, either in the cause in this country or by proceedings in *Ireland*, by which alone it could have been effectually done, until the filing of the bill in *Ireland* in 1836; and the claim, so far as the purchaser is concerned, now is, to arrest the future payment of the annuities purchased in 1819 and 1822, in satisfaction of rents received by Lord *Donegal* before 1819; whereas such equity ought to have been enforced against Lord *Donegal's* annuity which accrued immediately after that time. It appears to me that if there had been no other difficulties in this case, it

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would have been hardly possible for the creditors to have enforced such a claim at this time. But what is the equity sought to be enforced against the purchaser? The owner of an estate conveys it to trustees upon trust to pay to himself an annual sum, and to apply the residue in satisfaction of his debts; and he, notwithstanding, receives the whole of the rents, and that after an injunction and the appointment of a receiver. The creditors claim an account and payment of the rents so received, and they might have been entitled to the interposition of a Court of Equity to arrest the future payment of the annuity in satisfaction of the creditors' rents so received, but the sum so due for rents received does not otherwise constitute a lien upon the annuity; it is a right of set-off which requires an act of a Court of Equity to give it effect, and in this case no such act had taken place, or had been applied for at the time the purchaser's title accrued.

It was argued that the purchaser must have had notice of this equity, because there was a *lis pendens*; but without entering into the question how far the *lis pendens* in *England* was notice in *Ireland*, it is most material to consider of what the suit in *England* could have given notice; not of any such equity as is now contended for, because none such was asserted in the *English* suit, but merely of the order for an injunction and receiver, which, if not enforced, might have given ground for the claim; but the presumption would rather be that they had been enforced, in which case Lord *Donegal* would, at all events, have been entitled to dispose of his 10,000 *l.* a year. The title of the creditors depends upon the fact of Lord *Donegal* having continued to receive the rents after the injunction and appointment of a receiver; but of that fact the suit

gave no notice, and the creditor never asserted any title founded upon that fact till the year 1836; for though bills were filed in *Ireland*, their object was only to enforce the directions of the decree in *England*, and did not attempt to arrest the future payment of the 10,000 *l.* The creditors of Lord *Donegal*, though seeking payment of their debts, and having obtained a decree for that purpose in 1803, left Lord *Donegal* in undisturbed possession of his 10,000 *l.* a year; and in 1819 and 1822 he assigned the annuities of 5,000 *l.* and 1,000 *l.*, and 400 *l.*, for a valuable consideration, the two first to Lord *Belfast*, who afterwards made them the subject of his marriage settlement, and afterwards assigned his interest in them to Mr. *Wallace* as a security; and after this great length of time, the creditors now seek to appropriate the future payments in discharge of the amount of rent received by Lord *Donegal* beyond his 10,000 *l.* a year anterior to 1819,—for beyond that it is impossible to carry their claim,—and that against Mr. *Wallace*, who, during this delay and abandonment of a claim on the part of the creditors, has from time to time been advancing monies upon the security of the annuities. Under these circumstances, it appears to me clear that whatever may have originally been the equities of the creditors of Lord *Donegal*, a Court of Equity will not lend its assistance to enforce them against the parties now claiming interest in these annuities.

It was argued that the remedy of the parties claiming the annuities was to apply in the suit, to be examined *pro interesse suo*; but although it is true that a Court of Equity will not permit strangers to disturb the possession of its receiver, but will itself examine any claim they may have to the property over which

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the receiver is appointed, that rule does not prevent parties from filing a bill, and so asserting a title to property over which a receiver may have been appointed in another cause.

On the part of the creditors two cases were cited to which I think it right to refer. The first in point of date, and which seems most immediately applicable to the present cause, is that of *Priddy v. Rose (s)*. In that case, the tenant for life of a trust fund invested, and who was debtor to that trust fund in a sum of money which he had covenanted to invest, charged annuities upon the dividends of the invested fund, and became bankrupt, and it was held that the title of the trustees to retain the dividends of the invested fund, in satisfaction of what was due to the trust fund, by the bankrupt tenant for life, was to be preferred to the title of the annuities charged upon those dividends. It is to be observed that, in that case, the bankrupt was tenant for life of the very fund of which he retained part, and the trustees, who were to pay the dividends of the fund invested, were the parties to whom the part retained was due; whereas in this case, although there are the same trustees of both funds, the funds themselves are totally distinct. The 10,000 *l. per annum* was the property of Lord *Donegal*, and all the surplus of the rents was applicable to the payment of debts, and for that purpose was the property of the trustees. The trustees in that case had, as Sir *Wm. Grant* observed, a right at any time to stop the dividends in order to make good the deficiency in the trust fund; and he held, that they could not be deprived of that right by the grant of the annuities of which

they had no knowledge; and concluded by saying, that the trustees had done nothing to mislead the annuitants, or to forfeit the right which they originally had. In that case the parties claiming against the annuitants were in no manner accessory to the creation of the debt, of which they sought payment, whereas in this case the whole arose from the laches of the creditors in permitting Lord *Donegal*, from 1803 till the time of granting the annuities, to remain in possession, not only of his 10,000 *l. per annum*, but of the whole of the rents. In that case, Sir *Wm. Grant* said, that there was sufficient to give the annuitants notice of the debt; but in this case, even if the annuitants were to be affected with notice of the proceedings, such proceedings could not have led them to the supposition that the rents had not been received by the receiver, or at all events by the trustees, and properly applied.

In this case the creditors permitted the debt to arise by their own negligence, and never asserted their equity against the future payments of the 10,000 *l.*, until the right of those persons had been created, and been enjoyed for many years, and had become the subject of settlement and charge; and in that view of the case, the decision in *George v. Milbanke* (*t*) is applicable. Another case was referred to, of *Waring v. Coventry* (*u*), which was also relied upon, but that case does not appear to me to have any bearing upon the present case. In that case, the tenant for life had charged the *corpus* of the estate with a larger sum than he was authorized to charge, which was apparent from the deed under which the annuitants claimed; and those entitled in

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remainder were guilty of no laches, and had a clear title to have the inheritance exonerated from the excess of charge, out of the life estate.

My Lords, for these reasons, I think that the title of the Respondent *Wallace* is to be preferred to the equity asserted by Lord *Donegal's* creditors, and that the decree of the Court below is right, and that the appeal ought to be dismissed with costs.

The decree was accordingly affirmed, with costs.

Feb. 12, 13.
 May 22.
 June 7.

WRIT OF ERROR.

GEORGE WRIGHT - - - - *Plaintiff in Error.*
 SANDFORD TATHAM - - - - *Defendant in Error.*

ON a question of the competency of a party to make a will, letters written to that party by third persons since deceased, and found (many years after their date) among his papers, are not admissible in evidence, without proof that he himself acted upon them.

THIS was an action of ejectment commenced in the Court of King's Bench by the Defendant in Error against the Plaintiff in Error, to recover possession of lands in *Lancashire*.

The first occasion on which this cause came before a jury was on an issue of *devisavit vel non*, directed by the Court of Chancery, and tried before Mr. Justice *Park*, at the spring assizes 1830 at *York*, to which venue the cause had been removed, on account, as it was alleged, of the great excitement and prejudice prevailing in *Lancashire* on the subject in dispute.

The verdict then found affirmed the will. A motion for a new trial having been made before Sir *J. Leach* and refused, it was renewed before Lord *Brougham*, C. who, in consequence of having been Counsel for Admiral *Tatham* in the trial of the issue and on the motion before Sir *J. Leach*, called to his assistance in the hearing of it Lord Chief Justice *Tindal* and Lord *Lyndhurst*, C. B., and who finally, upon their advice, delivered judgment, refusing the motion. (*Tatham v. Wright*, 2 Russ. & Myl. 1.) The heir-at-law then brought ejectment, and the first trial came on before Mr. Baron *Gurney*, at the *Lancashire* spring assizes in 1833, when a verdict was found for the plaintiff. Letters, the admissibility of which in evidence was the question now brought before the House, were rejected. A bill of exceptions having been tendered, the case was argued in the Exchequer Chamber; and a division of opinion occurring among the Judges, a *venire de novo* was awarded. (*Wright v. Tatham*, 1 Adol. & El. 3; 3 Nev. & Mann. 260.) The cause came on again for trial before the same learned Baron, at the *Lancashire* summer assizes 1834, when the same letters being again tendered in evidence, he received them, and the jury found a verdict for the defendant. A motion was, upon this ground (and some others not now in discussion), made for a new trial; and Lord *Denman*, after time taken to consider, delivered the judgment of the Court, declaring the letters to be inadmissible, and therefore making the rule for a new trial absolute. (7 Ad. & El. 313. 330, and 6 Nev. & Man. 132.) At the *Lancashire* summer assizes, in 1836, the cause was again tried before Mr. Justice *Coleridge*. The letters were tendered and rejected, and the jury found a verdict for the plaintiff. Bills of exceptions were tendered by both parties. Judgment was signed as of course

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for the plaintiff in the Court of King's Bench, and a writ of error was then brought in the Exchequer Chamber, embodying the exceptions tendered on both sides, and the case was argued in Hilary vacation, 1837, before Lord Chief Justice *Tindal*, Justices *Park*, *Gaselee*, and *Bosanquet*, and Barons *Parke* and *Gurney*; and again in Easter vacation of that year, before the same learned Judges, with the exception of Mr. Justice *Gaselee*, who had retired, and whose place had been supplied by Mr. Justice *Coltman*. The Judges were equally divided in opinion, and the judgment of the Court below was therefore affirmed. (7 Ad. & El. 336. 408, and 2 Nev. & Perry, 305.) Upon this affirmance the present writ of error in Parliament was brought.

The bill of exceptions tendered by the Plaintiff in Error was in substance as follows :—

And upon the said trial it became and was a matter in controversy and at issue between the said parties whether or not the said *John Marsden* was and had been, from his attaining to competent age in the year 1779, and down to and at the time of his making the will and codicil in question in the years 1822 and 1825 respectively, a person of sane mind and memory, and capable of making a will; and as evidence to maintain the affirmative of the said matter in controversy and at issue, the Counsel for the said defendant proved that after the death of the said *John Marsden* many letters addressed to him by various persons were found, with other papers, in a cupboard under his book-case in his private room, and that to many of these letters, letters had been written and sent in answer, which last-mentioned letters were proved to be in the handwriting of and signed by the said *John Marsden*, and that upon some others of the letters so found there were indorsements in the handwriting of

the said *John Marsden* ; and which letters so answered and indorsed, were tendered and received in evidence upon the said matter in controversy and at issue. That amongst the letters so found, there was found a letter addressed to the said *John Marsden* by one *Charles Tatham*, the brother of the said *Sandford Tatham*, and a cousin of the said *John Marsden*, who was at the time of the date and writing of the said letter, and for some years after, staying in *America*, and which letter purported to be dated, “ *Alexandria, 12th October, 1784,*” and which letter was open and the seal broken, and of which the following is a copy :—

“ My dear Cousin,—You should have been the first person in the world I would have wrote too had’nt my time been imploy’d by affairs that called for my more imeadeate atention, in the first place I am call’d upon by my buseness it being the first consideration must by no means be neglected. As for my brother his goodness is such that I know he will excuse me till I am more disengaged was I to write to him in my present embarased situation I perhaps might only do justice to my own feelings & he might construe it deceit so different an oppinion have I of him to mankind in genl. who above all things are fond of flattery. I shall now proceed to give you a small idea of what has passed since my departure from *Whitehaven* as I supose *Harry* long ere now has told you the rest. We sail’d the 14th July & had good weather the chief of the way, but as you know nothing of sea fareing matters it is not worth while to dwell upon the subject we reach’d the Cape of *Virginia* the 13th *Septr.* but did not get heare till the beginning of the present month so we were about twenty days in coming 350 miles. When I arrived I was no little consirned to find the town in a most shocking condition the people

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dieing from 5 to 10 per day & scarsely a single house in town cleare of descease which proves to be the putrid fevour. I am going to *Philadilphia* in a few days if God spares my life and permits me my health and their I intend to stay till affairs here bare a more friendly aspect, & so the next time you here from me will be I expect from that place, tho' you'l please to direct to me heare as usual. God bless you my dear cousin and may you still be blessd. with health, which is one of the greatest blessings we require hear is the sinseare wish of dr. Cosn. your affect. kinsman and very humble servt., *Cha. Tatham*.—P.S. Pray give my kind love to my aunt my brother and my cousin *Betty*, allso my complements to all the rest of the family and all others my former acquaintances, &c.—*Alexandria* 12th *Octr.* 1784.”

And the Counsel for the said defendant further proved that the said letter was marked with the *London* post-mark as a ship-letter, and was in the handwriting of the said *Charles Tatham*, and addressed to the said *John Marsden*, esquire, *Wennington Hall*, where the said *John Marsden* then resided; and it was also proved that the said *Charles Tatham* was personally acquainted with the said *John Marsden*, and had been dead many years. And amongst the said papers of the said *John Marsden* there was found the following draft or copy of a letter from the said *John Marsden*, to the said *Charles Tatham*, in the handwriting of the said *John Marsden*:—

“ Dear Cousin,—I received your letter some time ago, wherein you mentioned that you had sent me a map of the United States of *America*, to the care of Mr. *George Welsh*, merchant, in *Liverpool*. I deferred writing till such times as I had made inquiry

after it, but did not get the map till the 7th instant. You mentioned in your letter that you had sent me a small quantity of dried fruit: I received nothing but the map, for which I am obliged to you. My aunt has had very poor health since you left *England*, she has scarce ever been well; I am in hopes she is getting better again; I think that change of air and a journey would be of service to her. We have lately had an account of poor Mrs. *Smith's* death; she died at *St. Albans* the 7th instant. My aunt has had a letter from your brother *Harry*, he is very well. It is reported that your acquaintance, Mr. *John Bradshaw*, is going to be married to a Miss *Fell*, of *Lancaster*; whether there is any truth in it or not, I cannot tell. I suppose you have received my last letter, wherein you will see an account of your nurse's death. I have nothing further to add, but compliments from my aunt and your cousin *Betty*. I am, dear Cousin, your affectionate kinsman, *J. Marsden*.—*Wennington Hall*, June 1st, 1787.

“*C. Tatham*, Esq.”

Which draft or copy of such letter, from the said *John Marsden* to the said *Charles Tatham*, was produced and read in evidence on the part of the said defendant. And thereupon the Counsel for the said defendant proposed and tendered the said letter of the said *Charles Tatham* to be admitted and read to the jury as evidence for the defendant, upon the said matter so in controversy and at issue as aforesaid; but the Counsel for the said lessor of the plaintiff objected to the admissibility of such letter as evidence, and to its being read to the jury; and the said Justice stated his opinion to be, and held, that the said letter was not by law admissible as evidence, and refused to

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admit the same to be read to the jury. Whereupon the Counsel for the said defendant made his exception to the said opinion and ruling of the said Justice, and tendered this his bill of exceptions thereon. And also as evidence to maintain the affirmative of the said matter so in controversy and at issue as aforesaid, the Counsel for the said defendant proved that after the death of the said *John Marsden*, and at the same time and place where the said letter from the said *Charles Tatham* was found, there was found amongst the said letters before mentioned a letter addressed to the said *John Marsden*, at *Wennington* aforesaid, where he then resided, by one *Oliver Marton*, and which letter purported to be dated 20th *May* 1786, and was open, and the seal of which was broken, and of which the following is a copy :—

“Dear Sir,—I beg that you will order your attorney to wait on Mr. *Atkinson* or Mr. *Watkinson*, & propose some terms of agreement between you and the parish or township, or disagreeable things must unavoidably happen. I recommend that a case should be settled by your & their attorneys, & laid before council, to whose opinion both sides should submit, otherwise it will be attended with much trouble & expense to both parties. I am, Sr. with compliments to Mrs. *Cookson*, your humble servant, &c.

“*Oliver Marton.*

“*May* ye 20th 1786. I beg the favour of an answer to this.

“*John Marsden*, esq., *Wennington.*”

And the Counsel for the said defendant further proved that the said *Oliver Marton* was at the date and writing of the said letter the vicar of *Lancaster*,

a town about eleven miles distant from the then residence of the said *John Marsden*, that he was acquainted with the said *John Marsden*, and that he had been dead upwards of thirty years, and that the letter was in his handwriting. And the Counsel for the said defendant further proved that one *James Barrow* was at the time of the date of the said letter the attorney of the said *John Marsden*, and had been dead upwards of thirty-five years, and that an indorsement on the back of the said letter, of these words, “ 20th *May* 1786 Letter from Mr. *Marton* to Mr. *Marsden*,” was in the handwriting of the said *James Barrow*; and thereupon the said Counsel for the said defendant proposed and tendered the said letter to be admitted and read to the jury as evidence for the said Defendant upon the matter so in controversy and at issue as aforesaid. But the Counsel for the lessor of the said plaintiff objected to the admissibility of such letter as evidence, and to its being read to the jury; and the said Justice stated his opinion to be, and held, that the said letter was not by law admissible as evidence, and refused to admit the same to be read to the jury. Whereupon the Counsel for the said defendant made his exception to the said opinion and ruling of the said Justice, and tendered this his bill of exceptions thereon. And also to maintain the affirmative of the said matter so in controversy and at issue as aforesaid, the Counsel for the said defendant proved that after the death of the said *John Marsden*, and at the same time and place when the said letters from the said *Charles Tatham* and *Oliver Marton* were found, there was found amongst the said letters before mentioned a letter addressed to the said *John Marsden* by one *Henry Ellershaw*, which was open, and the seal of which was broken, of which the following is a copy :—

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“ Dear Sir,—I should ill discharge the obligation I feel myself under, if, in relinquishing *Hornby*, I did not offer you my most grateful acknowledgments for the abundant favours of your hospitality and beneficence. Gratitude is all that I am able to give you, and I am happily confident that it is all that you expect. I have only therefore to assure you, that no circumstances in this world will ever obliterate from my heart and soul the remembrance of your benevolent politeness. May the Good Almight long bless you with health and happiness ! and when his providence shall terminate your Xtian warfare upon earth, may the angels of the Lord welcome you into blessedness everlasting ! It will afford me pleasure to continue my services during the vacancy, if agreeable to you. With every sentiment of respect and affection to yourself and the worthy family at the Castle, I hope you will ever find me your grateful, faithful and obliged servant, *Henry Ellershaw*.—Please deliver the enclosed to Mr. *Wright*, *Chapel-le-Dale*, 3d Octr. 1799.”—Addressed “*John Marsden*, Esqre. *Hornby Castle*.”

And the Counsel for the said defendant further proved that the said *Henry Ellershaw* had been for several years the curate of the chapelry of *Hornby*, to which he had been appointed by the said *John Marsden*, as patron of the said chapelry, and that he was well acquainted with the said *John Marsden*; that he had been dead some years; that the letter was in his handwriting, and that it had been written by him in the presence of the Rev. *John Garnett*, his assistant, when he the said *Henry Ellershaw* was about relinquishing the said preferment. And thereupon the said Counsel for the said defendant proposed

and tendered the said letter to be admitted and read to the jury, as evidence for the said defendant upon the matter so in controversy and at issue as aforesaid; but the Counsel for the said plaintiff objected to the admissibility of such letter as evidence, and to its being read to the jury; and the said Justice stated his opinion to be, and held, that the said letter was not by law admissible as evidence, and refused to admit the same to be read. Whereupon the Counsel for the said defendant made his exception to the said opinion and ruling of the said Justice, and tendered this his bill of exceptions thereon.

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Sir *F. Pollock* and Sir *W. Follett* (Mr. *Martin* was with them), for the Plaintiff in Error:—In considering the propriety of the rejection of this evidence, the nature of the case itself must be recollected. The question for the decision of the jury was, whether Mr. *Marsden* was competent to make his will. Certain evidence tendered to the jury, and bearing directly on this issue, was rejected. This evidence tended to show that he was competent to make his will. It consisted of letters which had been sent to Mr. *Marsden* by one of his cousins, and two other persons, and these letters were admissible, as forming part of the personal history of Mr. *Marsden*. The reading of such evidence is quite consistent with modern practice; *Prett v. Fairclough*(a), and *Hagedorn v. Reid*(b). There are two points which prove this evidence to be admissible. In the first place, it may be laid down as a rule, that on an inquiry whether a person is of sound mind at a particular period, letters written to him at the time, and after his death found in his custody, are admis-

(a) 3 Camp. 305. 397.

(b) Id. 379.

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sible in evidence to show the treatment he received from persons acquainted with him. The second question is, whether the letters set out in this bill of exceptions are admissible under this rule. The issue is not a question of fact, but of opinion, founded on fact. It must be conceded that if a person is living who knew him well, such person may be examined as to the state of mind of the deceased. Cannot this examination of persons be made after their death, through the medium of their own letters? What is the practice of the Ecclesiastical Courts in this matter? It is shown in the case of *Duins v. Donovan*(c), where, in a suit for nullity of marriage, the libel stated that the marriage was solemnized during the minority of the complainant; and one of the proofs of the father's dissent was a letter, which purported to have been written two months after the marriage, and as soon as the marriage came to the father's knowledge. It was objected that this letter was not admissible, because it might have been written with a view to a suit for nullity. Dr. *Lushington*, in delivering judgment, said, "The letter is admissible, not as the declaration of the father simply, but as part of the *res gestæ* connected with the marriage." On a similar principle, the letters here are admissible. The principles of receiving evidence must in all Courts be the same; nor in the Ecclesiastical Courts can those principles be changed by the circumstance that in the Ecclesiastical Courts the Judges are Judges of the law and of the fact. The acts of persons who well knew the deceased, are the best evidence of their opinion of him. They are opinions expressed at the time, without any disguise and without any premeditated purpose.

(c) 3 Hagg. 301 & 308.

Suppose, for instance, that the electors in a borough had elected a man their representative in Parliament, would not that be good evidence of their belief in his competency? The treatment of a man by his neighbours may have various degrees of confidence, and these degrees are best shown by their particular acts towards him during his life. Asking a person to take the sacrament, or lending money to him on his bond, would in like manner show a belief in his competency. If the person to whom the letters are sent acts upon them, they most clearly become evidence. So they would, on proof that he deposited them in a place where, with reference to the business on which they were written, they ought most properly to be found. The principle of this rule was fully adopted by this House in the *Bishop of Meath v. Marquess of Winchester* (d). It may be contended, that if such papers are admitted in evidence, they will be fraudulently put into places in order that they may be found; and no doubt the rule will be liable to such objection. But such a proceeding cannot be presumed. In a case of high treason itself, such evidence has been admitted (e). If in such a case the Court would not reject the letters on the ground of such a presumption, they cannot be rejected on that ground here. Some of these letters were found in the same place with others which had been answered or endorsed by the testator, and were therefore admissible beyond all doubt, and they were accordingly admitted; and the circumstance of all being found together, raises the strongest presumption that all were put into the same place by him. Under these

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(d) *Ante*, Vol. iv. pp. 224-234.

(e) *The King v. Horne*, 1 East, P. C. 98.

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circumstances, it is impossible to say that these letters can be rejected, without the House at once declaring that the testator was incapable of either reading or writing. The question, therefore, has been reduced to this, not whether the testator was capable of making a will, but whether he was capable of reading and writing the letters found in his custody. Of that there can be no possibility of doubt, since some of the letters have his indorsement upon them. The letters which are written by other persons to the testator on matters of business, are not merely opinions of the writers expressed to a person, but acts done by them with respect to a person with whom they would not have acted but in the belief of the soundness of his mind. Acts done by persons many years ago, and now proved by the production of letters admitted to have been written by them, must be better evidence of the opinions then entertained by those persons of the party to whom the letters were written, than their evidence, if now given in the witness box, could possibly be. Suppose a clergyman was to disappear from his residence, and 40 years afterwards a body was found with the pockets appearing to have remained untouched for many years, and in those pockets were found letters addressed to a person as a clergyman, and bearing the marks of having been opened and read, would not those letters be evidence in any proceeding respecting the identity of the clergyman, to show that the person in whose pockets they had been found was the clergyman who had disappeared about the date of the letters? They would be evidence of that fact, and as such evidence ought to be left to the jury. *Doe d. Patteshall v. Turford* (*f*), is not a direct authority on the question,

(*f*) 3 Barn. & Ad. 890.

but it shows the opinion of the Judges of the Court of King's Bench, that what is written at a particular time may be evidence to be considered by a jury as to what was done at that time by the party making the writing. There is no objection made to receive the letters written by the testator; but if others are found with them of nearly the same date, and some of them acted upon by the testator, and all put away in his usual place of depositing letters, surely all are equally admissible, and all ought to be received together. It is admitted, that if he had marked them they might be read; yet the marking of them would not alone prove that he had read them. The principle on which all these letters are admissible is, that they form part of one entire transaction. On this principle, the letters of a wife written to her husband before the time of an alleged adultery are admitted, in an action by him against the adulterer, for the purpose of showing what were the terms on which she had lived with her husband. The wife herself is not examined,—but her letters are read. Why? because credit is given to her for having acted with sincerity at the time; and her letters are receivable to show the state of her affections before her elopement, being written at a moment when she had no purpose to answer in writing them.

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Mr. *Creswell* and Mr. *Starkie*, for the Defendant in Error:—The principles on which the decision of this case must turn are stated in the book on Evidence, where the admission of collateral evidence for the purpose of indirect proof is treated of: “All the surrounding facts of a transaction, or as they are usually termed, the *res gestæ*, may be submitted to a jury, *provided they can be established by competent means*,

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and afford any fair presumption or inference as to the question in dispute" (g). It is clear that the best evidence is where the witnesses are produced, and subjected to cross-examination, for from that alone is the best estimate of the character of the evidence to be obtained. It is true that acts are admissible in evidence, but then they must not be the acts of third persons upon indifferent matter; although great latitude is justly allowed by the law to the reception of indirect or circumstantial evidence. "The law interferes to exclude all evidence which falls within the description of *res inter alios acta*" (h). Taken in the strongest manner, what do these letters amount to? nothing more than the opinion of the individuals by whom they are written. But this is an opinion not delivered on oath. On that ground alone it is objectionable. It is still more objectionable when it is recollected that it is an opinion the grounds of which cannot now be examined, nor its real nature and character ascertained. This observation which applies with regard to the letter of Mr. *Charles Tatham* may be made, with at least equal force, in the case of that written by Mr. *Ellershaw*. But even if the letters themselves, provided that they had reached Mr. *Marsden*, could be treated as admissible, there is no proof that they ever did reach him. Then, *ex concessis*, they are not admissible. It is said that these letters form part of the personal history of the testator. But his personal history must consist of his acts, not of the opinions formed of him by people in his neighbourhood, or by his distant relations. Even treatment of him by other persons is no better than opinion. Foreigners may send letters written in their own languages to a London

(g) Stark. on Evid. vol. 1, p. 57; 2d edit.

(h) Ibid. p. 58.

merchant, on the business of his house. His situation would seem to render it probable that he understood those letters; but the fact that they were sent to him would not prove such to be the case. Yet that would be part of his treatment by others. The treatment of a man by other persons is no proof of his competency or incompetency to make a will. The election of a man to a seat in Parliament may, taken alone, prove nothing. He may be in *Rome* or *Naples* when he is elected, and his election may depend on many other circumstances besides his personal qualifications. His speeches on the hustings during the progress of the election would be something: there is nothing of that sort here. In referring to the practice of the Ecclesiastical Courts on this subject, it is clear that those Courts have always considered it a matter of importance to have the persons who pretend to speak to a testator's incapacity subjected to a cross-examination, in order that their means of knowledge, and their desire to give or to falsify facts, may be truly ascertained. In *Wheeler v. Alderson*, Sir J. Nicholl (i), referring to the different depositions of different witnesses on the subject of the supposed incapacity of a testator, says that "witnesses speaking to transactions and conduct spread over many years, are apt to describe them as if constant and continuous habits;" and he remarked in a similar manner on this circumstance, of the manner in which witnesses, even speaking honestly, estimated facts, in *Walters v. Howlett* (j). In order to know how far this habit of thinking and speaking may have influenced their judgment, the witnesses themselves must be produced; the production of their letters is not sufficient; for even in their letters

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(i) 3 Hagg. 605.

(j) Id. 790.

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they may have formed opinions in the most incorrect manner, and on the most incomplete acquaintance with the facts. In *Billingham v. Vickers* (*k*), Sir *J. Nicholl* made the same observations, showing how necessary it was to subject to cross-examination witnesses who came to prove a permanent incapacity, in virtue of several acts of extravagance committed at different times. All these, and many other authorities, showing that the best and not secondary evidence ought to be adduced on this subject, are collected in *Williams on Executors* (*l*). The letters here offered are at best but evidence of a secondary nature. They only show that the writers of them did write to the testator; but why they wrote, under what circumstances they wrote, or whether they believed that the testator could or would himself attend to their letters, is left totally unexplained. There is no proof whatever of any act done by Mr. *Marsden* upon these letters: there is not any proof as to the person by whom these letters were found, nor even any to show that they were put by the testator in the place where they were ultimately found. For aught that appears to the contrary, though in form directed to Mr. *Marsden*, they might have been read and acted on by Mr. *Marsden's* man of business. There is the greater reason for believing this to be the case, since there is no other evidence to prove that during the last 40 years he ever wrote or read any other letters than those now produced. It is said that these letters show what was the opinion of the men who corresponded with Mr. *Marsden*. The opinion of a man who has seen the person, respecting whose sanity or capacity the discussion has arisen, may be received in evidence, but then it must be clear that the evidence really presents

(*k*) 1 Phill. 191.

(*l*) Vol. i. pp. 35-199, *et seq.*

the opinion. Here it is not proved that the writers of the letters had seen, or had seen within a reasonable time, the person to whom they wrote : it is not shown that the letters expressed the opinion of the writers as to his capacity ; nor, if they did, has it been shown that that opinion is receivable, as one formed by persons who had opportunity to judge of the testator's state of mind. The whole evidence now offered is matter of inference. It is contended that because certain letters addressed to the testator are found in the drawers of the testator, it must be presumed that he knew their contents, and that the persons who wrote the letters believed him capable of understanding them. The instance of a body found with certain letters in his pocket has been referred to. That case is not in point for the present argument. It would be more so if put thus,—a body of a man is found with a Latin letter in his pocket : but surely no one would contend that the possession of that letter would be good evidence that the dead man had understood Latin. The objections to the admissibility of these letters are, that they are not shown to have been read by the testator, or acted on by him ; that they do not, except by a strained inference, show what was the opinion of the writers of them ; and that, if they did, they cannot be received ; but the writers, if alive, must be called, in order to explain whether they really did entertain any opinion as to the capacity of the testator, and, if so, how that opinion was formed.

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The *Lord Chancellor* said he should require time to consider how to frame the questions to be put to the Judges.—(The only question afterwards submitted for their opinions was, whether the three letters hereinbefore set out were admissible in evidence, on behalf of the Plaintiff in Error.)

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The letters
not admiss-
ible (m).

Mr. Justice *Coleridge* :—In answer to the question stated by your Lordships, I beg humbly to express my opinion that neither of the letters was properly admissible in evidence. Only three grounds, that I am aware of, have been stated in argument for their admissibility, and I can conceive no more: it has been urged, 1st, that, considering the nature of the question at issue, the time when the letters were written, and the decease of the writers, they are admissible as declarations of the unbiassed opinions of those writers; opinions on which they acted, and as accompanying such acts: 2dly, it has been said that they are admissible as acts of treatment, exhibited by the writers towards Mr. *Marsden*: 3dly, that they are admissible because they accompany and explain acts done by Mr. *Marsden*. The first two grounds apply generally, and, if correct in principle, would sustain the admission of all the three letters; but I think they are not to be supported: the last is undoubtedly sound as a rule, and therefore each letter must be tried by it, and, in order to exclude all, all must be shown not to fall within it.

The death of
the writers
does not make
the letters
admissible.

The first ground on which the admissibility of the letters is rested, lays all participation, all acts by Mr. *Marsden* in regard to them, out of the question: it becomes indifferent whether the letters ever reached him or not; the only things material are the writing and sending. The former shows the opinion of the writer, the latter vouches it. But, if the writer were alive, and producible in court, although the same reasoning would apply, it could hardly be contended that the letters could be read;

(m) As the opinions of the Judges delivered in this case contain many important *dicta*, it has been thought advisable to print references to them in the margin; the length of some of the opinions rendering such a course advantageous for the purposes of reference.

the first principles of the law of evidence would prevent it; and I do not think it can be said that the death of the writer necessarily varies the rule. It is every day's experience that the death of a witness deprives the party of the testimony he would have given, although his statement of it, and his having acted upon the faith of it, may be capable of the clearest proof. Nor does the rule vary because the remoteness of the period, and the absence of any dispute on the matter at the time, put aside all suspicion of insincerity. The general rule still remaining the same, that evidence must be given upon oath; and it being certain that this case does not fall within any of the known exceptions hitherto stated in our books, is there any new principle on which it may be rested? As all the participation by Mr. *Marsden* is by the supposition excluded, the letters stand on exactly the same footing as if they had been addressed or their contents really stated to a third person; and the argument for the defendant below has met this view of the case, as it was bound to do. One learned Counsel at your Lordships' bar contends that the opinion expressed in or to be collected from the letter is evidence, because it is a declaration accompanying the acts of writing and sending the letter. But the answer to this is irresistible; wherever a declaration, in itself inadmissible, is admitted as part of an act, because it explains, qualifies, or completes it, the act itself must be evidence in the cause without the declaration; but, in the present case, dismiss the declaration, and the act itself becomes wholly irrelevant, and therefore inadmissible. It is merely arguing in a circle, first to pray in aid the declaration to make the act relevant, and then to make the declaration admissible by showing it to be a part of the act. Another learned Counsel, feeling this, has therefore more boldly

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In order to make a declaration accompanying an act admissible in evidence, the act itself must be admissible in evidence.

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asserted that in this case mere opinion as such is evidence, and that this is the expression of opinion legitimately proved as any other act. Suppose, says he, his fellow townsmen had elected Mr. *Marsden* to be their representative in Parliament, might I not prove that fact as evidence of their opinion of his competency? Assuming, as the argument does, that Mr. *Marsden* is connected with such election by no act on his part before, at the time, or after, I distinctly answer, no. The question seems to me based on the fallacy, that, whatever is morally convincing, and whatever reasonable beings would form their judgments and act upon, may be submitted to a jury. The mere word of a man of character, the mere opinion of a man of experience and prudence, where by some act he vouches its sincerity, will naturally and properly influence our opinions; but the law of England requires the sanction of an oath to that which is to influence the verdict of a jury. I do not indeed concede, though it is not perhaps necessary now to decide the point, that the mere opinion of a witness, even on oath, is, as such, admissible evidence upon a question of competency. Where you can bring the decision of that question, as you sometimes may, to depend upon deductions from scientific premises, you may hear those deductions expressed as opinions by scientific men. The necessity of the case justifies this departure from the general rule; but competency, in the main, is a question of fact, and the jury are to draw their conclusion from the evidence of the facts before them, not from the opinions which others may have formed from facts not before the jury. I admit that, in practice, where the witness to facts is present, it is by no means uncommon to ask directly for his opinion: such a question it would be idle to object to; for, the objection would only lead to a detailed

inquiry into particular facts, which the witness is there ready to go into. Nothing, therefore, would be gained by it. I am not, however, aware that this question has ever, upon argument, been decided to be correct in form. But if it be, the argument is by no means relieved from another insuperable difficulty: if opinion, merely as such, be evidence, it cannot be proved by hearsay in the case supposed, of an election to Parliament offered to prove the opinion: such election can amount to no more than this, that each elector may be considered to say, I vote for Mr. *Marsden*, because I believe him to be competent: the number makes no difference. Now, proof of this declaration *per se* would not be legitimate evidence of the elector's opinion; and it is not made evidence by the fact that he votes in accordance: that fact, indeed, may make the declaration morally more convincing; but it is not in itself admissible, because irrelevant to the question of competency. One other case, put by the same learned Counsel in this part of his argument, it may be as well to notice here: Mr. *Marsden* had executed a bond to the late Mr. *Bell*, for a large sum of money lent. Proof of the execution of the bond, let in proof of all the circumstances attending the loan—that Mr. *Bell* had known him (with the remark that he must have thought him competent)—and that he was a very good judge of such matters. No doubt it did. The act of executing the bond was an act of Mr. *Marsden's*. To see what its quality was, and what inferences were to be drawn from it, it was necessary to look into all the surrounding circumstances; and those circumstances therefore becoming evidence, it became impossible to restrain either Counsel or jury from a consideration of Mr. *Bell's* opinion, which in itself would not have been

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evidence. But it is overlooking solid distinctions thence to infer, as was attempted in argument, that it might have been shown that Mr. *Bell* had made him his executor ; because that would be only doing directly what in the admitted evidence in the cause had been done indirectly. Could that fact have been shown in Mr. *Bell's* lifetime without calling him ? If not, how would his death have made it evidence ?

Upon principle, then, I think it abundantly clear, that, upon the first ground suggested, these letters are not receivable.

Rules of evidence in the Ecclesiastical Courts not to be imported into the Common Law Courts.

But we are pressed with the authority of the Ecclesiastical Courts. I agree that this is a subject over which they have jurisdiction, and with which they are in practice very conversant. I agree in the great convenience of having but one rule of evidence in every Court in which the same subject-matter comes for decision : and, filled as the judgment-seats in those Courts are, and have been for many years, their decisions will be received by no one with more respect than by myself. I do not, therefore, presume to question the decisions referred to. But, when a rule of evidence is sought to be imported thence into our Courts of Common Law, I remember that rules of evidence are technical, framed, and wisely framed, with reference to the tribunal in which they are to be applied ; and that what may be a safe rule when the same Judge decides both law and fact, may be dangerous when the fact is entrusted to the jury. Other acknowledged differences as to the rules of evidence prevail between the two Courts ; and the same argument which is urged to-day for the admission of these letters, might be pressed to-morrow for the proof of handwriting by direct comparison, for the examination of witnesses secretly, or for the proof

of certain charges by not less than two witnesses, where the rule of the common law requires but one.

I have been so full in considering the first ground on which the admissibility of these letters is rested, that I need say little on the second, the same principles being applicable to both. Treatment of another, it has been observed, is a somewhat ambiguous term: it may mean that demeanour towards a third person of which he is conscious, and which ought naturally to produce some effect on an intelligent being, to be displayed in some outward act; or it may simply refer to the agent, and exclude all consciousness on the part of the third person. It is in this latter sense that the term is here used, and in this sense treatment is at best but a demonstration of opinion; and, consequently, if I am right in the remarks that I have made upon opinion, these letters cannot be receivable as acts of treatment.

I am now brought to the consideration of the third ground taken by the Counsel for the defendant below, that these letters are admissible, because they accompany and explain acts done by Mr. *Marsden*; in other words, that there is evidence with respect to each of these letters that Mr. *Marsden* had done some act, which act would in itself be relevant to and admissible upon the point in issue, his competency; and the act itself being admissible, whatever accompanies it, and serves to explain its character, is relevant and admissible also. The principle here applied is admitted on all hands to be correct, and was laid down by the Court of Queen's Bench when a new trial was granted in *Doe d. Tatham v. Wright*. The only question therefore remaining is one of fact—whether there was any evidence of such act by Mr. *Marsden* in regard to all or any one of these letters. It must be admitted,

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These letters
not evidence
as acts show-
ing the treat-
ment of the
testator by
the writers.

Nor as expla-
nations of the
acts of the
writers.

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that the burden of affirmatively shewing such evidence rests on the party tendering the letters: it must also be admitted, I think, that on a question of competency all inferences from acts which assume the competency of the agent, are to be excluded; for, that being the matter under discussion, to assume it, and to draw any inference from such assumption which may help to prove the competency, is to reason in a circle. On the other hand, I shall freely concede that neither fraud nor the want of competency is to be presumed. Under these conditions, I examine the evidence from which I am desired to draw the conclusion that Mr. *Marsden* did any independent intelligent act with respect to any one of these letters. And, first, as to the letter dated in 1784, from *C. Tatham*. What is the evidence? It is found after the testator's death with other papers and many letters addressed to him, to some of which drafts of answers in his handwriting are found in the same place, and others of which are indorsed in his handwriting. The time of finding is not stated; the place is a cupboard under his bookcase, in his private room; the letter is found open, and the seal broken: the writer was a relation, and personally known to Mr. *Marsden*, and had been dead many years. Further than this, a draft of a letter from Mr. *Marsden* to *C. Tatham*, dated in 1787, was found in the same place: this draft referred to another letter, but not to this letter, from *C. Tatham*, and also to a previous letter from Mr. *Marsden*. These particulars are adduced in order to raise a reasonable presumption that Mr. *Marsden* opened and read the letter. If they raise this presumption, I do not rely upon what is undoubtedly true, that the mere competency to open and read a letter would be the logical conclusion to be drawn, and that the letter was

adduced as evidence not merely of that, but of competency to make a will ; but I admit that it then ought to have been submitted to the jury with the other facts in the case, as evidence of the competency, which was the fact in issue. But, do these particulars raise the presumption ? Of all of them, there is but one which is unambiguously the act of Mr. *Marsden* ; that is, the draft of his letter in 1787 : but this makes no reference to the letter in question ; and it seems to me an unwarrantable inference to draw from the fact of a letter written at an interval of three years, and referring to a previous letter, that the writer had seen and read one about which he is wholly silent. The additional fact, that the letter in question and the draft are found in the same place, cannot be drawn in to aid the inference, until it be clear that Mr. *Marsden* had read the letter, and deposited both, or knew of their deposit, in that place. What is the evidence of these facts ? None direct ; and every circumstance stated is equally consistent with the assumption of competency or incompetency. If Mr. *Marsden* had been an intelligent man, he would have opened and read his own letters, and would probably have preserved them, if preserved at all, in such a place as this was found in. Again, the mere facts of preservation and a common place of deposit being admitted, if he were incompetent, his manager or man of business would have opened and read his letters, and would have probably preserved them, if preserved at all, in such a place, as this was found in. The facts then being consistent with either view of the case, he whose duty it is affirmatively to establish either, must fail if he relies on this for proof.

The same examination leads even more clearly to the same conclusion as to the third letter ; that written

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by Mr. *Ellershaw*; for there is literally nothing as to that but the place of deposit and the company in which it is found, from which an inference is to be drawn that Mr. *Marsden* ever saw or read it. It is not even alleged that he was in the habit of receiving or reading letters addressed to him, or that in the whole course of his life he ever read a single letter so addressed.

I come now to the second letter, about which more doubt has been entertained, although I confess it appears to me, when tried by the same tests, to present no grounds of distinction. This letter is found in the same place as the others; it relates to a matter of business on which Mr. *Marsden's* attorney was to be communicated with: and it bears an indorsement purporting to be of the same date with that of the letter, in the handwriting of the attorney. It had, therefore, reached the attorney, and had been returned by him. The purpose of the letter was understood and complied with by him who opened and read it. But who was that person? or, rather, what is the affirmative evidence that Mr. *Marsden* was that person? Is there anything in the evidence which is not ambiguous as to that fact, the very corner-stone of the admissibility of the letter? Is there anything which does not take its whole cogency from assuming, one way or the other, the condition of Mr. *Marsden's* intellect, which is the very matter under inquiry. It is said, that, to assume the intervention of a third person, is to assume fraud. I answer, that I assume no fraudulent intervention; for, the character of the intervention would depend on the condition of Mr. *Marsden's* mind. If he were competent, and this was his place of deposit, under his control, the interference of a third person, first to intercept, and then

introduce, without his knowledge into that place, a letter addressed to him, would indeed be fraudulent: but if he were incompetent, it would be consistent with the most friendly feelings and the most honourable principles, that some one for him should have read, acted upon, and finally deposited the letter. I conclude, therefore, that this, like the two other letters, was not shown to be admissible.

I desire permission, having answered your Lordships' question, as it was my duty to do, to state that I am by no means satisfied that the admissibility of the letters, under the circumstances set forth, is a matter which a Court of Error can in any way inquire into. As at present advised, I incline to think that, upon examination, it will appear to turn simply upon a question of fact, as to which the conduct of the Judge at *nisi prius* can be reviewed only by the Court out of which the record comes. It is not, however, the time now to enter into that inquiry; and I mention this point only that I may individually not be considered as concluded with regard to it on any future occasion.

Mr. Justice *Williams*:—I agree in the view which has been taken by my learned brother who has preceded me. I think that all the three letters contained in the bill of exceptions are inadmissible, though with somewhat more of hesitation and doubt as to one of them than as to the two others. The circumstances of the time when and the place where they were found, are the same as to all. No time is specified as to the finding; and though the bill of exceptions describes the place (a cupboard) to have been in the apartment of Mr. *Marsden*, there is no statement of his ever having been seen to use it as a place of deposit for

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Qu. whether the admissibility of the letters, under the circumstances set forth, is not solely a question for the Court out of which the record comes, and therefore not examinable in a Court of Error.

(*Williams, J.*)

All the letters inadmissible.

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No doubt of
 the admissi-
 bility of the
 letters, if they
 had been en-
 dorsed by
 Mr. *Marsden*.

letters, nor is there any proof that he was in the habit of so using it. The letters have been produced, however, and thereupon the question has arisen, and the admissibility of them has been contended for upon two heads of argument, in themselves perfectly separate and distinct; and either of which, if established, would, I admit, sustain the affirmative of the proposition contended for. In one view of the case, the question would be of such easy solution as hardly to deserve the name. If upon the back of all or any of these letters there had been any indorsement in the handwriting of Mr. *Marsden*, or if any act had been done by him avowedly in consequence of the contents, or any part of them, such letters or letter must of necessity be submitted to the jury, with a view to ascertain how far such indorsement contained any material or appropriate comment, or how far the act was consequent upon or in accordance with a fair and reasonable interpretation of the contents. The letters in such case must be admitted, or the writing and act of Mr. *Marsden* be rejected, which would obviously be against all reason and principle.

It was contended, that, apart from all agency of Mr. *Marsden*, or consciousness by him, a letter addressed to him by a person of intelligence and capacity was, in itself, proof of his state as to intellect; that, if it furnished evidence of treatment, as it has been called (how he was estimated, and what was the judgment of the writer), it was more than opinion; it was opinion with an overt act attached to it, opinion acted upon; and that, to suppose that a man of undoubted understanding should address sensible observations upon any matter of business or pleasure to a known driveller and idiot, is a monstrous absurdity, and an outrage upon experience and common sense. In this view of

the subject, it is obvious, as I have observed, that the agency of Mr. *Marsden* (in the particular transaction at least) is wholly out of the question: he need not see the letter or hear of it. If it can be shown to have been written, and by some accident not delivered, if such delivery had been intended, the effect would be the same. The tone of the letter, according to this argument, is to be attended to; the sense of the writer, or, if the expression be preferred, the treatment by him of the person addressed, is every thing in this or in whatever way the argument may be presented.

I must observe, first, that, with whatever industry and ingenuity the argument may be cloaked and disguised, it is at last resolvable into opinion, and opinion only; and that, if it be so, it is opinion presented in such a shape as makes it inadmissible for want of the sanction of an oath, under which evidence of opinion is always given; which sanction is required for this weighty reason—that opinion, however imposing from the real or supposed respectability of the person expressing it, may, after diligent and patient inquiry and examination before those to whose judgment all evidence is addressed, be deemed by them to rest upon a precarious foundation, or upon none at all.

Next, if a letter written and addressed as above, be supposed to be no more than opinion—and I have already said that I think it is no more—it seems to be difficult, if not impossible, to distinguish it from a statement made in conversation respecting the understanding of any given person by another, who I will suppose possessed ample means of knowledge by acquaintance or intimacy. And, if the effect likely to be produced by it afford any criterion for ascertaining whether the evidence should be received or not, there could, I presume, be little doubt upon the subject.

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Viewed in the strongest manner, these letters are only the opinions of the writers, and opinions not given on oath.

Statements made in conversation could not be receivable in evidence: these letters are no more.

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Morally speaking, what could be more likely to produce a strong impression and conviction than a declaration made by a person of undoubted credit and capacity respecting the state of mind of an old friend? a declaration I will imagine accompanied with all the details and particulars upon which the judgment was formed, and calculated to give it weight? Supposing such a person to be dead, but that the conversation could be detailed by another of credit equally unimpeachable, would it not inevitably (and I may add, deservedly) produce a great effect in any inquiry which might be instituted respecting the capacity of the person about whom the conversation was held, and the opinion given? The value and importance of the evidence, however, and the serious nature of the loss to the party unavoidably deprived of it, operate nothing. The cautious rules by which the rejection of evidence is determined, affect as well the most weighty opinions as the most worthless gossip, unless vouched by the indispensable sanction of an oath; a certain few and well-known cases only excepted. Moreover, it is to be observed, that it is not the matter or the manner of the party writing or speaking, but that of the party addressed, which is material when the capacity of the latter is in question. Persons may have been found whose malignity or bad taste, or in whatever manner such a character should be described, might attribute to acknowledged infirmity the possession of qualities and attainments to which it had not the slightest pretension. Letters are sometimes addressed in tones of the deepest humility and submission, which are in substance defiance to the utmost. Until, therefore, the person addressed has himself acted on the communication in some manner or other, all deduction must be hazardous and precarious, all conclusion in-

The party receiving the letters must act on them.

complete. Suppose, (an illustration used at the bar) a letter or letters in Greek or Latin, of Attic or Ciceronian purity, to be addressed and sent to a given person; could his knowledge of either of those languages be inferred from that circumstance alone? or, rather, would not all judgment or opinion necessarily be suspended until it was ascertained whether he was able to make some appropriate, or at least intelligible commentary, or (more material still) to return something like an answer?

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Lastly, it is a circumstance of no small weight in determining my opinion upon this part of the question, that, with all the industry and ability of the learned Counsel for the defendants below, no single instance has been adduced of evidence of this kind having been admitted in a Court of Common Law. When I reflect upon the frequent occurrence of questions of this kind, and I must add, the probable existence of such proof in favour of competency, I cannot account for its absence, except upon the supposition that it has been assumed and considered to be inadmissible for the purpose for which the evidence was upon the present occasion tendered. I beg to express my entire concurrence with the opinion of my learned brothers (upon this point nearly, if not wholly, unanimous), that the course and practice of the Ecclesiastical Courts furnish no rule for our adoption. The difference of the tribunals affords a sufficient reason for the distinction. In those Courts the Judge who receives the evidence is (contrary to our course) the Judge also of its effect. Whether that evidence when received be more or less stringent (as I believe their phrase is), or whether it be entitled to no weight at all, depends entirely upon the judgment of the Court which first decides the question of admissibility. Whatever

No precedent for the admission of evidence of this sort.

The rule of evidence in the Ecclesiastical Courts not to be adopted in the Common Law Courts.

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therefore may be said as to the propriety of the same rule prevailing universally, I do not think that the decisions of the Ecclesiastical Courts amount to an authority in a Court avowedly acting upon the rules and principles of the common law.

Mr. Marsden
 does not ap-
 pear by any
 act to have
 identified
 himself with
 these letters.

I come now to the second branch of the question, which is, it must be admitted, attended with more difficulty, inasmuch as it is upon this part that a different view has been taken, and in consequence of it a difference of opinion exists among the learned Judges. The question then is, whether Mr. *Marsden* has in any manner identified himself with (if the expression be allowable), or, in other words, has by any act, speech, or writing, manifested an acquaintance with and knowledge of the contents of all or any of these letters. If he has, such letter or letters must have been improperly rejected, otherwise not. And here it may not be improper to make, in passing, the remark, that every letter so recognised was without objection received, as will presently appear. The facts regarding such letters are thus stated in the bill of exceptions: "That, after the death of Mr. *Marsden*, many letters addressed to him by various persons were found with other papers in a cupboard under his bookcase, in his private room: that, to many of these letters, letters had been written and sent in answer, which last-mentioned letters were proved to be in the handwriting and signed by him, *John Marsden*; and that, on some others of the letters so found, there were indorsements in the handwriting of the said *John Marsden*; which letters so answered and indorsed were tendered and received in evidence upon the said matter in controversy." I have before adverted to some of the circumstances observable in this statement; but it is unnecessary to remark, that,

if the inquiry had assumed some other shape, in which the competency of Mr. *Marsden* had been brought or not into question, instead of its being *the* question, there would have been abundantly enough to show that he had read the letters in question, or rejected them as unworthy of perusal, and, upon the supposition just made, that he of course understood them.

But it has been argued at the bar—first, that there must be no assumption of competency or incompetency (to which I agree); that the question is, as it were, in abeyance until the end and final determination; that it is throughout an open question, which can only receive a decision from the fair result of all the facts and circumstances which may have been brought to bear upon the case on both sides; and that, consequently, the effect of these letters, if admitted, might be nothing, because the jury might be satisfied by the preponderance of adverse testimony that Mr. *Marsden* did not nor possibly could have understood all or any of them: but still that they should be received with whatever weight might properly belong to them, and form part of the case. Next, that fraud is not to be presumed, there being no statement or finding of any; and that, by consequence, any inference arising from unfair conduct in any person as to the custody or any other circumstance attending these letters, is unwarranted and inadmissible for the present purpose.

With respect to the first argument, however, it seems to me that the admissibility of the evidence must depend upon the matter in controversy, which it is stated in the bill of exceptions here, was, “whether Mr. *Marsden*, from his attaining to competent age, in the year 1779, down to the time of his making the will and codicil, in the years 1822 and 1825, was a person of sane mind and memory, and capable of

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making his will;" that some agency or cognizance of Mr. *Marsden* must be shown in each particular piece of evidence tendered, in order to make it admissible at all; and that each piece of evidence must be judged of from the circumstances applicable to itself; that, to raise any inference in favour of the admissibility of these three letters, or any of them, from certain other portions of evidence admitted and existing in the case, is a proceeding in kind, though not in degree, the same as an assumption of the entire competency of Mr. *Marsden*, which being granted, all difficulties vanish, and there is no question or doubt to solve; and lastly, as in this part of the argument to which I am addressing myself it was said (and I think properly), that there should be no assumption of competency one way or the other, and the matter must be considered in equilibrio, it lay upon the defendant below to give the evidence to turn the scale, and to show affirmatively some "dealing" with these letters—to use an expression which has been before employed—or some of them, by Mr. *Marsden*, in order to make them admissible at all.

I come now to the presumption of fraud. That this cannot be made, and must be found, in order to form an ingredient in the argument, may well be admitted. But it is unnecessary to say more in support of that view of the subject which I have been taking, than that the presumption alluded to need not be, and I think has not been made.

Having thrown these observations together in the hope of avoiding repetition, the application of them to the three letters respectively will be reduced to a narrow compass. The first is from *C. Tatham*, a cousin of Mr. *Marsden*, dated *Alexandria*, 12th October 1784: as to which, as well as the two others, if treat-

ment of Mr. *Marsden* had been sufficient, it is impossible to doubt that he is addressed as a person of competent understanding. With reference to that, however, which, as I have said, is in my opinion necessary to warrant its reception, there is nothing but its being found in the place before described, open and with the seal broken. The copy of a letter from Mr. *Marsden* to *C. Tatham* (received in evidence) in no respect alluded to the letter in question, nor was anything shown to have been said or done upon it. Suppose it had been proved, which here it was not, that Mr. *Marsden* broke the seal, and the issue had been whether he could read or not, would the fact of breaking the seal furnish any proof of his being able to read the letter? Why should it of his being able to understand it?

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The next letter to be noticed, because it is open to precisely the same remarks, though not the next in order of time, is that from Mr. *Ellershaw*, dated the 3d *October* 1799, and addressed to Mr. *Marsden*, and expressing much gratitude for many favours received. If the former letter be inadmissible, this of course must be inadmissible also.

The third is a letter from Mr. *Marion*, the vicar of *Lancaster*, to Mr. *Marsden*, dated 20th *May* 1786, begging that Mr. *Marsden* would order his attorney to wait on two persons named, to endeavour to effect a compromise in some dispute which it seems was likely to arise; and recommending a case to be drawn, by the opinion upon which both parties should be bound. And, what is more material, on the back of this letter there was an indorsement, in the handwriting of one *James Barrow*, long since dead, but then the attorney of Mr. *Marsden*, the date of which indorsement was the said 20th *May* 1786.

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I have said that I have entertained somewhat more of doubt and hesitation as to this than as to the other letters, partly from the weight which has been attached to it by others for whose opinion I have great respect, and partly because there is something imposing, at first sight at least, in the fact of the letter having been found on the very day it bears date, in the very custody where, according to its contents, it ought to have been, viz. in the possession of the attorney of Mr. *Marsden*; and if it had been proved that the letter was so placed by Mr. *Marsden* himself in the hands of *Barrow* after perusal by him, no better proof would be required that he had understood and acted upon it, and that, too, a letter upon business. But, upon consideration, it seems to me that the circumstances attending this letter are substantially not distinguishable from those attending the former. The admissibility of this letter also rests upon an implied assumption of Mr. *Marsden's* capacity: because he received the letter, read, and understood it, therefore he delivered it to Mr. *Barrow*; that is, the assumed capacity of Mr. *Marsden* is the foundation of the whole,—the thing to be proved.

Suppose (apart from all suspicion of fraud) Mr. *Marsden*, not from incapacity, but indolence, had deputed his affairs generally, or this affair in particular, to his man of business, and that the latter, from previous conferences with *Marton*, was acquainted with the subject of the letter, and knew that *Marton* was about to write; why might not the man of business, upon seeing *Marton's* writing, have at once transmitted the letter to *Barrow*? or why, if *Barrow*, knowing *Marton*, and having the information above supposed, had been at Mr. *Marsden's* house upon the arrival of *Marton's* letter, might he not have taken it

away with him at once ? But I do not rest upon this, and mention it only in consequence of observations made upon the alleged arbitrary assumption of fraud. The foundation of my opinion is, that neither competency nor incompetency should be presumed, and that therefore the burthen was cast upon the defendant below, who tendered this piece of evidence, to give affirmatively some proof that the mind of Mr. *Marsden* had been exercised upon it, to make it admissible in a case where the only question was the actual state of that mind : and no such proof was given.

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Mr. Baron *Gurney* :—This is an action of ejectment brought to recover considerable estates in the county of *Lancaster*. It was tried at the summer assizes 1836, before Mr. Baron *Parke*. The lessor of the plaintiff claims as heir-at-law of a gentleman of the name of *Marsden*, who died in the year 1826, at the age of sixty-eight. It is stated in the bill of exceptions, that the matter in controversy was, whether Mr. *Marsden*, from his attaining to competent age in the year 1779, down to the time of his making the will and codicil in the years 1822 and 1825, was a person of sane mind and memory, and capable of making a will. And, to maintain the affirmative of the matter in controversy, the letters set out in the bill of exceptions were tendered in evidence. The facts are thus stated—that, after the death of Mr. *Marsden*, many letters addressed to him by various persons were found with other papers in a cupboard under his bookcase in a private room ; that, to many of those letters, letters had been written and sent in answer, which last-mentioned letters were proved to be in the handwriting of and signed by him, *John Marsden* ; and that, upon some others of the letters

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 All the letters
 admissible.

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so found, there were indorsements in the handwriting of the said *John Marsden*; which letters, so answered and indorsed, were tendered and received in evidence upon the said matter in controversy. It appears, therefore, that Mr. *Marsden* had a private room, and in a cupboard under his bookcase in that room were found letters of various descriptions: some to which he had given answers; and these letters and answers were read in evidence: some which he had indorsed; these, too, were read in evidence: and the three letters in question, upon which there were no indorsements written by him, and to which there were no answers produced. One of those letters was written in the year 1799, by the Rev. *Henry Ellershaw*, perpetual curate of *Hornby*, Mr. *Marsden's* parish, to which curacy he had been presented by Mr. *Marsden*; it was written, in the presence of his assistant, upon the occasion of his relinquishing that preferment. The second was written by *C. Tatham*, the brother of the lessor of the plaintiff, on his arrival in *America*. And the third, by the Rev. *Oliver Marton*, vicar of *Lancaster*.

All the transactions of Mr. *Marsden's* life were subjected to the view and consideration of the jury, to enable them to form their judgment of the competency of his mind; all that he said, all that he did, and all that under certain circumstances he omitted to say and do. It appears to me that the transactions connected with this, which I think must be taken to be Mr. *Marsden's* depository of papers and letters, afford no insignificant means of judging of his competency. If the letters had been found with the seals unbroken, that might have afforded evidence of a total want of curiosity, if not of imbecility of mind. The finding them with the seals broken, is, I think,

prima facie evidence that they had been opened and read by him to whom they were addressed, and in whose depository they were found. It is said that this supposition is founded on a presumption of competency, which is the question to be tried. But, when it is stated that these unindorsed and unanswered letters were found in company with some letters which were indorsed by Mr. *Marsden*, and with others which were answered by him, and the letters in his own hand are produced and read, I do not see that it is forming any presumption of his competency, to assume that the seals had been broken and the letters read by him: it appears to me that it is only from a presumption that any other inference is to be drawn.

It has been said in argument that it is not stated how soon after his death these letters were found. If it had been intended by the Counsel for the lessor of the plaintiff to use any argument of that kind, he should have shown, if he could, by cross-examination, that the distance of time was such as to weaken or destroy the inference that they had been placed there by the testator. It is further said, that it is not found that no other person used the room. But it is found to be his private room. It is said, that it is not found that Mr. *Marsden* wrote the indorsements, and the answers which are mentioned, without the tutorage of another. But that should have been shown, if it could have been shown, to affect the reception of this evidence. It is sufficient that the letters are found in such a place and in such company. The question is not, what is the weight of the evidence when received; the question is not, whether any suspicious circumstances may or may not attach to it: all that is matter of observation for the jury. If any facts could be

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The contents
of the repository where
the letters are
found, are ad-
missible in
evidence.

introduced to raise a suspicion that these letters were foisted into this place by any other person than Mr. *Marsden*, they would doubtless have their effect where they ought to have it; but nothing of that sort is stated. The letters bear every mark of genuineness: they were written at periods very remote, when no question of the competency of this gentleman had arisen: they were written by persons well acquainted with him, and these persons were dead long before this question arose. I think, therefore, that the contents of this repository are evidence—evidence of more or less value, according as they are fairly or unfairly laid before the jury.

Again, it is asked, who knows that these letters were deposited in this cupboard by Mr. *Marsden*? I think that the company in which they were found is *prima facie* evidence that they were deposited by him. They were found in the same place with the letters which he had indorsed, and the letters he had answered. It was matter of inquiry for the jury whether any other person was likely to have deposited them there, whether any other person used or sat in that room, whether the letters produced were all the letters found, or whether garbled. On an indictment for high treason, letters with the seals broken, in the possession of the person indicted, are evidence against him, although there be no indorsement of his, and no letter of his in answer; because the presumption is that, the seals having been broken, he has perused the letters. So, here, I think that the finding them raises the same presumption, and that it is not a sufficient answer that this is a question of competency. These observations appear to justify the reception of the letter of Mr. *Ellershaw*.

The finding of
letters with
the seals
broken, in
such repository, raises the
presumption
that the person to whom
they were
addressed
read them.

Upon the other two letters, the argument for their

reception is much stronger. First, the letter of *C. Tatham*. It appears, that, in 1784, *C. Tatham* went to *America*; and on his arrival he wrote this letter to Mr. *Marsden*, which bears the mark of a ship-letter, and has the post-mark. If nothing more appeared, it would stand upon the same footing as the letter of Mr. *Ellershaw*. But, further, there was found among the papers of Mr. *Marsden*, a draft of a letter from Mr. *Marsden* himself to *C. Tatham*, dated in *June* 1787, which proves that these parties had been from the year 1784 till that time in a course of correspondence; for he says, “I received your letter some time ago, wherein you mentioned that you have sent me a map of the United States of *America*. I deferred writing till such time as I had made inquiry after it, but did not get the map until the 7th instant. You mention in your letter that you had sent me a small parcel of dried fruits; I received nothing but the map, for which I am obliged to you. I suppose you have received my last letter, wherein you will see an account of your nurse’s death.”

It is objected that this draft of a letter does not make the letter of 1784 evidence, because it is not an answer to that specific letter. I cannot see the difference between a letter which acknowledges another of a series of correspondence, and a letter which acknowledges the letter in question. If it had acknowledged both together, that, it is admitted, would have made it evidence. If the draft had been, “My dear Cousin,—I have received your letter of the 12th of *October* 1784,” and nothing more, that would have made it evidence. But his answering another letter of the series, commenting upon the terms of the letter, acknowledging the receipt of one thing, and noticing the non-receipt of another which ought to have

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accompanied it, &c. &c., that does not make it evidence, because it refers to a later letter of the series. The distinction appears to me to be too refined. It is further objected that the letter was addressed to Mr. *Marsden* at *Wennington Hall*, where he then resided, and that it was found at *Hornby Castle*, to which he had removed from *Wennington Hall*, and at which he had resided for many years before his death; and that that weakens the presumption that it was placed in this cupboard by Mr. *Marsden*. So far from weakening it, it appears to me to strengthen that presumption. It is in the natural course of things that a gentleman should remove his private papers when he removes his residence.

Lastly, there is the letter of the Rev. *Oliver Marton*, the vicar of *Lancaster*, the county town, a few miles from which Mr. *Marsden* lived, written to him on business requiring professional assistance, requesting that Mr. *Marsden* would order his attorney to wait on one of two gentlemen, who are named, to propose terms of agreement between himself and the parish; recommending that a case should be settled by the two attorneys and laid before Counsel. This letter written fifty-two years ago, by a gentleman intimately acquainted with Mr. *Marsden*, is found to have been in the hands of Mr. *Barrow*, the attorney of Mr. *Marsden*, also resident at *Lancaster*, who has been dead thirty-five years; and there is an indorsement on the back of the letter, in the handwriting of Mr. *Barrow*—"20th May 1786, letter from Mr. *Marton* to Mr. *Marsden*." It is objected that this letter is not evidence, because it is not proved, first, that the letter was received by Mr. *Marsden*; secondly, that it was by him shown to Mr. *Barrow*; thirdly, how it came back into the hands of Mr. *Marsden*; fourthly, when Mr. *Barrow*

made that indorsement; and fifthly, that it was placed in this cupboard by Mr. *Marsden*.

I think that these observations are applicable only to the effect of the evidence when produced, not to its production; they are to be addressed to the jury. To require such proof of events that occurred half a century ago, is to require impossibilities. The only persons who could have given it have been long in their graves. The legitimate inferences to be drawn from this letter thus indorsed, are, that the letter was received by Mr. *Marsden*; that he did, either personally or by letter, consult Mr. *Barrow* on the subject; that Mr. *Barrow* had the letter under his consideration, and returned it to Mr. *Marsden* with the advice which he thought proper to give upon it. That is the natural and ordinary course of things; and I do not think that we are called upon to presume every thing that is forced and unnatural, to exclude evidence from the consideration of the jury.

The answer, therefore, which I humbly give to the question propounded by your Lordships, is, that all the three letters should have been received in evidence.

The letters
admissible.

Mr. Justice *Patteson*:—In answer to your Lordships' question in this case, I have to state, that in my opinion, none of the letters tendered was, under the circumstances, admissible in evidence.

(*Patteson, J.*)
The letters
inadmissible.

The issue in this case embraced the consideration of Mr. *Marsden's* state of mind during the whole of a long life; and, as it seems to me, every act of that long life might be shown and was relevant to the proper determination of that issue. The letters in question are proposed as evidence on one of two grounds—first, as showing the opinion of the writers, and the mode of treatment which they adopted to Mr.

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Marsden—secondly, as connected with Mr. *Marsden's* own conduct in regard to the letters, and explanatory of that conduct. The first ground is indeed not very strongly, if at all, insisted on, so far as it rests on the mere opinion of the writers, independent of any communication of that opinion to Mr. *Marsden*: but it is insisted on as a mode of treatment of him, since the letters were addressed to him. Now, if it be conceded, as I think it must, that the mere opinion of a deceased writer as to the competency of another person, not given upon oath, nor under circumstances which afford the parties to be affected by that opinion any means of inquiring into the reasons on which it was adopted, or the facts on which it was founded, cannot be held admissible, I am quite at a loss to see how the circumstance of that opinion being contained in a letter addressed to the individual respecting whose competency the inquiry is instituted, can make any difference. It shows, after all, nothing but the opinion of the writer, and the sort of treatment which he adopts towards the party; but it does not in the least tend to enable a jury to judge whether that opinion was right, or that treatment proper; it cannot have any weight, unless it be some which is derived from the authority of the writer; and it ought not on that ground to influence or even to be laid before a jury. The conduct of the individual whose competency is in dispute, under such treatment by others, is that alone which can enable a jury to judge as to the propriety of that treatment; and it is that conduct (which is in truth the admissible evidence), and not the treatment, which is proper and necessary to be laid before the jury, in order to enable them to understand and appreciate the conduct of the individual, and for that purpose only.

The conduct of the individual whose competency is in dispute can alone enable the jury to judge as to the propriety of his treatment by others.

The second ground is, as it seems to me, the real ground on which the admissibility of the evidence in question is sought to be established. Upon this I believe that no difference of opinion will be found to exist as to the principle on which such evidence is admissible. Every act of the party's life is relevant to the issue; of course, therefore, any thing which he can be shown to have done in regard to any written document, being evidence, it follows that such written document must itself be received; otherwise, the true character of the act which he has done in regard to it cannot be properly estimated, or the jury be enabled to judge how far that act is or is not indicative of the state of his mind.

In every case, therefore, the first point to be considered will be, whether any act has in truth been done by the party in regard to the document proposed to be given in evidence. Now, without stopping to consider how far the determination of the Judge at the trial upon this point (which is a question of fact, and may perhaps depend on conflicting testimony, and as I apprehend can only be submitted to the jury) can be made the subject of a bill of exceptions, or in any other manner can be subjected to a revision, I proceed to consider the circumstances under which each of the three letters in question was tendered: concerning them, your Lordships' question calls upon me to give such an opinion as I should have given had such a point arisen upon a trial before me.

It is material to recollect the issue in this cause, viz. the competency or incompetency of Mr. *Marsden*; because I apprehend it to be essential, that, upon the trial of every issue, evidence should not be received which is based on any presumption one way or the other involving the subject-matter of that issue. The

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Every act of the party's life is relevant to the issue; anything which he can be shown to have done in regard to any written document, being evidence, it follows that such written document must itself be received.

Qu. whether the opinion of the Judge at the trial, on a point of this sort, can be made the subject of a bill of exceptions.

The issue here is, competency or not.

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The repository
of the letters
furnishes no
argument.

The breaking
of the seals
is immaterial.

place in which the letters were found does not, in my judgment, furnish any argument, for it does not appear to have been one in which Mr. *Marsden* himself was in the habit of depositing papers, or which he kept private to himself, or was accustomed to examine. They are found in company with other papers on which he had written different matters; which circumstance, so far from showing that he had read and understood the letters in question, rather tends the other way, from the absence of any writing of his upon them. The seals being broken seems to be wholly immaterial, since it does not appear by whom that was done. Nor, indeed, would the breaking of the seals afford any criterion as to the state of mind of the person who was proved to have broken them. These circumstances are common to all the letters. I come now to consider those which are peculiar to each letter.

The first of them is from a Mr. *C. Tatham*, dated *Alexandria*, 12th *October* 1784. No writing of Mr. *Marsden's* appears upon it, nor is any answer to it found, nor is allusion made to the contents of it in any writing of Mr. *Marsden*. But a copy of a letter from Mr. *Marsden* to Mr. *C. Tatham*, in the handwriting of the former, bearing date 1st *June* 1787, was given in evidence, which refers to some other letter received from Mr. *C. Tatham*; and therefore it is insisted that the former letter of the 12th *October* 1784, which is not referred to by Mr. *Marsden*, is to be received as part of a correspondence. It seems to me that this argument is founded on a mistaken view of the principle on which the letters can be admitted at all. If a correspondence be adduced in evidence to establish the existence of certain facts, or the knowledge of those facts by any individual, or the admission of their

truth by that individual, unquestionably the whole of the correspondence must be read; and the circumstance of one letter not being noticed by the person to whom it is addressed, may not exclude it. But, where the object of the evidence is, to establish that the individual to whom the letter is addressed had a mind capable of understanding the contents of the letter, it seems to me that it is necessary to bring each particular letter, whether it be part of a correspondence or not, as it were, under the eye of the individual; for he may have been capable of understanding one letter and not another, or he may have been capable at one time and not at another. The interval of time between 1784 and 1787 is considerable, and the letter, a copy of the answer to which is given in evidence, is not found: there is, therefore, nothing to show that Mr. *Marsden* ever dealt with the letter of 1784 in any way; and I think it was properly rejected.

The next letter is that of Mr. *Oliver Marton*, dated the 20th *May* 1786. It requests Mr. *Marsden* to direct his attorney to wait on a Mr. *Atkinson*; and it has the words “20th *May* 1786, letter from Mr. *Marton* to Mr. *Marsden*,” indorsed on it, in the handwriting of Mr. *Marsden*’s then attorney, Mr. *Barrow*. No direct evidence is given to show that this letter ever passed through Mr. *Marsden*’s hands, or that he ever dealt with it in any way. But it is said that it must be presumed that the letter was sent by Mr. *Marsden* to the attorney, inasmuch as the letter itself requests him to communicate with his attorney, and inasmuch as the attorney has written upon it, and because such would be the ordinary course of dealing with such a letter. Now, with all possible respect for the opinion of others, I confess that such reasoning seems to me to be nothing other than *petitio principii*, reasoning in

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In a question of this sort each individual letter must, in order to become evidence, be brought under the eye of the person to whom it is addressed.

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No presumption can be made that *Marsden* knew and had acted upon *Marton's* letter.

a circle. The question at issue is, whether Mr. *Marsden* was a competent person, whether he could and did deal with ordinary matters in the ordinary course; and, in order to render this letter evidence in support of the affirmative of that proposition, by reason of his having read and dealt with it, a presumption is sought to be made that he did see and deal with this letter, because a competent person, in the ordinary course of events, would have so done. It seems to me that no such presumption ought to be made, nor, indeed, any presumption whatever; but that, in order to let in any letter of another person as evidence, direct and positive proof of the party to whom it is addressed having dealt with it, must be required. If, indeed, the exclusion of this letter rested on any presumption of incompetency in the party to whom it is addressed, or of fraud in those about him, I fully agree that it ought not to be excluded, because no such presumption ought to be made. But the exclusion of the letter does not, in my judgment, rest on any such ground. Mr. *Marsden*, whether he was a competent person or not, may have employed some one as his secretary to open his letters and to transact business for him, from various motives; and that may have been done in this and in many other instances without any fraud of any sort. The point to be established, in order to render this letter admissible, is, that Mr. *Marsden* personally dealt with it; and that point ought not, as it seems to me, upon this issue, to rest upon presumption of any sort, but solely upon direct and positive testimony.

The last letter is one from the Rev. Mr. *Ellershaw* to Mr. *Marsden*, written on occasion of his relinquishing the cure of his parish. I am wholly at a loss to guess upon what ground this letter is tendered, unless it be as containing the opinion of the writer, or as

showing his mode of treating Mr. *Marsden*. I have already stated to your Lordships my opinion that no letter is admissible upon such ground; and it is not pretended that this letter has been dealt with by Mr. *Marsden*.

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I have only, in conclusion, to notice the cases which have been cited as decided in the Ecclesiastical Courts, in which it is said that letters of members of the family, not dealt with by or even communicated to the person whose sanity was in dispute, have been received as evidence of the treatment adopted towards him by those who knew him, and so, as being relevant to the issue. Whether the admission of such evidence be attributable to any peculiar rule of those Courts, or to the circumstance that the same person there decides upon questions both of law and fact, I cannot tell; but I am quite unable to see any sound principle on which they can be admitted; and, however much I may regret that any different views of evidence should prevail in different Courts, I cannot consider those cases as binding authorities even in the Courts of Common Law in *Westminster Hall*, much less in your Lordships' House.

No intelligible principle on which these letters are said to be receivable in the Ecclesiastical Court.

Mr. Baron *Alderson*:—After fully considering the question which your Lordships have put to the Judges, I have also arrived at the conclusion that all the three letters ought to be rejected as evidence upon the trial in question. These letters were addressed to the testator by persons acquainted with him, and whose opinion as to his capacity, if properly proved, would be received as evidence in the cause. But the point to be considered first, is, how that which is matter of opinion is to be proved. I conceive that it is to be proved, like any other fact, by evidence on oath given

(*Alderson, B.*)
 The letters not admissible.

If they are presented as matter of opinion, such opinion must be proved like any other fact.

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in open court. The law of England, so far as I know, makes no distinction between such opinion and any other material fact. The general rule is, that facts are to be proved by testimony of persons on oath, and subjected to cross-examination. There are, no doubt, exceptions to this rule, in which hearsay evidence is admissible. One such exception is to be found in the case of public rights. There, the general interest which belongs to the subject would lead to immediate contradiction from others, unless the statement proved were true; and the public nature of the right excludes the probability of individual bias, and makes the sanction of an oath less necessary. Again, the case of dying declarations, which is however confined to homicide, is another exception to the rule. But these exceptions, and the principles which govern them, are wholly inapplicable to a case like the present. If, therefore, the letters are to be used as proofs of the opinion of the writers respecting Mr. *Marsden's* capacity, the objection to their admissibility is, that this opinion is not upon oath, nor is it possible for the opposite party to test by cross-examination the foundation on which it rests.

To decide a question of competency, the jury must have evidence of the conduct of the party himself.

The object of laying such testimony before the jury, is, to place the whole life and conduct of the testator, if possible, before them, so that they may judge of his capacity: for this purpose, you call persons who have known him for years, who have seen him frequently, who have conversed with him or corresponded with him. After having thus ascertained their means of knowledge, the question is put generally as to their opinion of his capacity. I conceive this question really means to involve an inquiry as to the effect of all the acts which the witnesses have seen the testator do for a long series of years, and the manner in which

he was during that period treated by those with whom he was living in familiar intercourse. This is not properly opinion, like that of experts; but is rather a compendious mode of putting one instead of a multitude of questions to the witness under examination, as to the acts and conduct of the testator. Instances of such questions are not uncommon. A witness in a case of assault is frequently asked his opinion which of the two, the plaintiff or defendant, began the affray: no one considers the opinion of a witness in such a case as evidence; but when it is obvious that he has seen the whole, and can, if required, state all the circumstances in detail, such a compendious mode of putting the question is often allowed without objection. But there, the real meaning of the question is, what were the circumstances of the transaction: and unless the witness be then capable of deposing to them, the opinion could not be received at all.

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A letter, therefore, as a mere opinion, is not evidence at all; for it cannot give these sanctions. If it were receivable, a letter to a third person, or an oral declaration to a third person, would be evidence equally. But no one has contended that these are receivable. I conceive, therefore, that these letters are not receivable upon this ground: nor are they receivable as being what has been called treatment—of which, however, I do not profess to understand the meaning: nor like conversations addressed or acts done to Mr. *Marsden* in his presence, and of which he is proved to be cognisant. Of course, the mere circumstance that the conversation was in writing would make no difference; and I agree that conversation addressed to Mr. *Marsden*, or conduct towards him, would have been evidence if he were shown to be cognisant of it. But why? Because it explains and

A letter, as a mere opinion, is not evidence.

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illustrates his conduct—which is in effect an act done by him—in hearing the one and receiving the other. His manner at the time—even though he made no answer—would be proper to be left to the jury. But a letter is like a conversation in which you have no such accompanying conduct to be explained and illustrated. It is like conversation addressed to a man when asleep or intoxicated, or which he did not hear; or conduct towards him in his absence; which would not be admissible.

Every act of
 the party is
 evidence.

There is no
 act of his
 proved here.

But then, lastly, it is said that the letters are receivable as having been acted upon by the testator, and as explanatory of his acts; and, if that were the case, I should agree in the conclusion. Every act of the testator is evidence; and if these are letters which qualify or illustrate or explain any act of his, they are receivable. But then, the first step to be taken is, to show some act of the testator, by clear evidence; for that is the foundation of the whole. Here, that step wholly fails: this is an attempt to raise a superstructure which has nothing to support it. If the testator had made an indorsement on any one of them, the contents of the letter would have been receivable. But why? Only for the purpose of showing that the indorsement was a rational act, not for the purpose of showing the opinion of the writer. If an answer to the letter had been sent by him, the letter is in like manner receivable to show the rationality of such answer. But what act is there here? As to the letter of *C. Tatham*, it is, as it seems to me, wholly unconnected with the draft of the letter mentioned in the case, and which is in the testator's handwriting. There is no indorsement on it by the testator. The same observations apply to Mr. *Ellershaw's* letter.

The only other circumstance relied on as to these

two letters, is, that they are found open, in a cupboard under the testator's bookcase, with other letters bearing his indorsements on them; and it is contended that this proves an act of the testator in opening and putting them there. Letters found in such a situation are no doubt evidence against a party accused criminally, or civilly charged, and he is presumed cognisant of their contents. But that is on the tacit supposition that he is a man of sound mind. To make such a supposition here, is to beg the question which is to be proved—a vicious mode of reasoning in a circle. Where the question is doubtful, whether a man be or be not of competent understanding, no acts, the proof of the existence of which entirely depends on such inference, can be relied on at all.

Here the Judge, reasoning on the subject, may be supposed to have said, “If Mr. *Marsden* was capable, he opened the letters and placed them there; if not, some one else did those acts. But the nature of this question precludes me from saying whether he was capable or not. Therefore, I cannot say whether he did the act or not; but the party who propounds the letters must prove that before I can receive them.” It seems to me that the Judge in so reasoning would reason rightly. The same observation applies to Mr. *Marton's* letter: Mr. *Barrow's* indorsement only proves that it was in his custody for the purpose of being acted on. Now, if Mr. *Marsden* was capable, we ought to infer that he had sent, or caused that letter to be sent, to Mr. *Barrow*. If Mr. *Marsden* was incapable, we ought to conclude that some other person acting on his behalf had sent it to Mr. *Barrow*. The fact of its being in Mr. *Barrow's* possession is equally consistent with either supposition; and therefore when it is the question whether Mr. *Marsden* were capable

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Place where
the letters
found imma-
terial; only
material on
the supposi-
tion that the
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or not, the foundation that the indorsement of Mr. *Barrow* necessarily proves an act done by Mr. *Marsden*, fails altogether. And if no act be proved to be done, then the contents of the letter, which are only admissible to explain an act, are not receivable at all.

Upon the whole, I think the question put by your Lordships ought to be answered in the negative. And the view I take of the nature of such evidence makes me very anxious that the rule should be so established; for I feel convinced that it always passes current for far more than its real value, which is very trifling, and is, above all other evidence, likely to lead a tribunal constituted like a jury to the most erroneous result. It is clear that, in this case, those who propose these letters as evidence, do it only for the purpose of laying the opinion of the writers before the jury; a point which I believe all the Judges are unanimous in thinking they are not receivable to prove.

(*Bosanquet, J.*)
 All the letters
 inadmissible.

Mr. Justice *Bosanquet*:—Having fully expressed my opinion in the case which has been laid before your Lordships, that all the three letters in question are inadmissible in evidence, I forbear, out of respect to your Lordships, from detaining the House by repeating at any length the reasons upon which that opinion is founded.

After hearing the argument at your Lordships' bar, and reconsidering the subject, I adhere to the opinion which I delivered in the Court of Exchequer Chamber, the substantial grounds of which may be thus shortly stated:—The opinions of deceased persons, acquainted with the testator, respecting his sanity, however distinctly expressed, are not receivable in evidence, unless given upon oath in the course of a

judicial proceeding. The letters and acts of such persons, from which their opinion may be inferred, cannot amount to more than opinion positively stated, unless they afford occasion to the testator of manifesting his own conduct or deportment respecting them. Everything spoken to or read by the testator, and every act done in his sight or hearing, may afford an important inference of his capacity or incapacity; but the acts of individuals to which he is not a party, can lead to no conclusion beyond that of the agent entertaining a certain opinion or conviction of the testator's state of mind. No one of the letters is expressly proved to have been opened by the testator, or in any way recognized by him. They were all found, indeed, in a place where a rational man might be supposed to have placed them; but, before any inference as to his capacity can thence be drawn respecting the testator, it must be assumed that he acted rationally. A man in his sound mind would probably have placed the letters where they were found after the testator's death; but, as the question to be tried is, whether he was of sound mind or not, is it arguing in a circle to say that the testator must be supposed to have placed the letters in a particular place, because a man of sound mind would have done so; and thence to infer that he was of sound mind, because he disposed of his letters in a rational manner. A distinction, however, has been insisted upon respecting the letter addressed to the testator by Mr. *Marion*, because the contents of the letter appear to have been acted upon; the letter having contained a request that the testator would order his attorney to take some step for the purpose of proposing an arrangement between the testator and the parish, and the letter having been found indorsed by the attorney, who

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Not to be presumed, as of course, that it was the testator who placed the letters where they were found.

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must therefore have received it. But, in my opinion, the objection already stated applies to this letter as well as to the others. If it be to be inferred that the testator delivered the letter to his attorney, his doing so affords evidence of his capacity to understand the letter; but, until it be shown by some evidence beyond the contents of the letter, that it came to the hands of the attorney by the act of the testator, the admissibility of the letter in evidence must be open to precisely the same objection as that which applies to the letters found in his private apartment. Who placed the letters in that apartment, and who delivered Mr. *Marton's* letter to the attorney, are questions the answers to which depend upon the inference to be drawn from a supposed sound state of mind: and, as the existence or non-existence of that state of mind is the matter in issue, no legitimate conclusion can be drawn from assuming either one alternative or the other.

The rules of evidence in the Ecclesiastical Courts are not applicable to the Common Law Courts.

The practice of the Ecclesiastical Courts, relied upon by the defendant below, however adapted to the constitution of those Courts, appears to me to be at variance with the principles of evidence by which the Courts of Common Law are governed, and not to be binding upon them.

For these reasons, therefore, without further detaining your Lordships, the answer which I have humbly to give to your Lordships' question, is, that no one of the letters was admissible on behalf of the defendant below.

(*Bolland, B.*) Mr. Baron *Bolland*, after stating the question, said, the matter in issue between the parties was, the validity of a will and codicil under which the defendant in the action claimed; and it became and

was a matter in controversy whether or not *John Marsden* was and had been from his attaining to competent age in the year 1779, down to, and at the time of his making the will and codicil in question in the years 1822 and 1825 respectively, a person of sane mind and memory, and capable of disposing of his property by will. As evidence to maintain the affirmative, the Counsel for the defendant proved that, after the death of the said *John Marsden*, many letters addressed to him by various persons were found, with other papers, in a cupboard under his bookcase in his private room ; that, to many of these letters, answers had been written and sent, in the handwriting of and signed by the said *John Marsden* ; and that upon some others of the letters so found, there were indorsements in the handwriting of the said *John Marsden*. The letters so answered and so indorsed were tendered and received in evidence at the trial. Amongst the letters so found, there were three letters upon the admissibility of which the opinion of the Judges is required by your Lordships. It will be convenient to set out the letters, and afterwards to observe upon the evidence by which the Counsel for the defendant contended for their reception. [The learned Baron here read the three letters.] In order to establish the authenticity of the letter from *C. Tatham*, the defendant proved that it was marked with the *London* post-mark as a ship-letter ; that it was in the handwriting of *C. Tatham*, and addressed to *John Marsden*, esq., *Wennington Hall*, where he then resided ; that *C. Tatham* was personally acquainted with the said *John Marsden*, and at the time of the trial had been dead many years. In order to show, in addition to the evidence of the place where the letter was found, that the letter had come

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to the knowledge of *John Marsden*, and had been dealt with by him, the defendant produced and read the copy of a letter from the said *John Marsden* to the said *C. Tatham*, found amongst the papers of the said *John Marsden*, and in his handwriting; that letter was in these words [the learned Baron read it, and then referred to the evidence given on the part of the defendant, as to the way in which the letters were found].

Now, my Lords, connected as I have been with the inquiry out of which the question proposed for decision arises, in having been twice examined as a witness on the trial of the action of ejectment on the part of the defendant, to establish the competency of Mr. *Marsden*, at the time I knew him, to make the will in dispute; and as my acquaintance with him, and my opportunities of forming an opinion of the state of his mind, and the extent of his capacity, included the period at which the last of the three letters was written, I find myself placed in a difficult position. It is no easy task for me to look at the question in the abstract, independently of my conviction of the capability of Mr. *Marsden* to understand these letters, and to deal with them as their contents called upon him to do. I shall, however, in the opinion I deliver, endeavour strictly to do so.

In order to show the state of mind of a person whose competency is brought in question, the acts of third parties towards him may be proved.

To determine this question, it will be right to consider what are the rules which are to be applied, and by which we are to be guided. I take it to be settled, that, in order to show the state of mind and understanding of a person whose competency, as in the present case, is brought in question, whatever is said, written, or done by the friends of the party, and others who may have had transactions with him, is evidence to be submitted to the jury who are to decide

upon such competency, provided what has been so said, written, or done, can be proved to have been known to and acted upon by such party. In confining myself to this rule, I do not mean to be understood as having lost sight of the position put forward and strongly relied on by the learned Counsel for the defendant below, that the conduct of others toward and respecting the testator, although not amounting to conduct personal to him, may be used in support of the admissibility of these letters; nor to have passed over without notice the practice of the Ecclesiastical Courts, in reference to evidence of that description; or not to have given due weight to the high authority of the very learned Judge of the Prerogative Court, Sir *John Nicholl*, in the judgments delivered by him in the cases of *Wheeler and Batsford v. Alderson* (n), and *Watts v. Howlett* (o), and the more complete report of the judgment in the latter case, in 1 Ad. & El. 8. Although I cannot adopt the entire repudiation of such evidence in our Courts of Common Law, as some of my learned Brethren in their judgments in a former stage of the proceedings in this cause have done, yet, as my opinion proceeds upon grounds within the limit of the rule upon the application of which there can be no doubt, it will not be necessary to consider whether or not the practice of the Ecclesiastical Courts of admitting such evidence can be legally adopted to the full or any extent in a Court of Common Law.

Under these circumstances, the question therefore is, whether the place in which these letters were found, the various other letters and papers with which they were found, and the state in which such

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Unnecessary
 to consider
 whether the
 practice of the
 Ecclesiastical
 Courts as to
 evidence of
 this kind can
 be legally
 adopted in the
 Courts of Law.

(n) 3 Hagg. Eccle. Rep. 609.

(o) Ib. 790.

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Considering
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 stances under
 which they
 were found,
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papers and letters were, and the other proofs relied on as showing a dealing with the three letters by Mr. *Marsden*, were sufficient to make them, or either of them, admissible in evidence? That I may put this question into a proper state for consideration, it is necessary to look at it as untainted with any fraud or sinister contrivance whatever, either as to the place where the letters were found, the accompanying papers and letters with which they were found, or the state in which the three letters were at the time of their discovery.

Considering all the circumstances surrounding them, and looking, in addition, to the contents of the letters themselves, it appears to me that they were all of them receivable in evidence. The evidence respecting them which applies in common to the three, are, the place and company in which they were found, and their being in the handwriting of the persons from whom they purport to have come, their being addressed to Mr. *Marsden*, and their being found open, with their seals broken. As to the place where they were found, it was a cupboard under the bookcase in the private room of Mr. *Marsden*; and the letters were found open. Where could papers belonging to a private country gentleman have been more naturally looked for? But it is suggested they might have been thrown there unnoticed and unread. Is this to be presumed, when the company in which they are found, and the fact of their being open, rebuts the inference? Papers found in the possession of persons charged with conspiracy and treason have been given in evidence against them; the presumption being that they had been read, and that the contents were known to the parties. In the present case there have been further and more deci-

sive acts done. The letters are found with their seals broken; and the other letters found with them show that Mr. *Marsden*, by the indorsements in his own handwriting upon several of them, was perfectly competent to mark and register his having dealt with them; and such letters, so indorsed by him, were admitted and read; but, on account of the absence of similar indorsements on the letters in question, they were rejected. If no other proof of Mr. *Marsden* having dealt with these letters had been given, I submit it was amply sufficient to call upon the learned Judge to lay them before the jury: but there are other reasons arising out of the letters themselves, and other facts applicable to each respectively, that appear to me to fortify this opinion; and place the matter beyond the reach of doubt.

I will take each letter separately. The first is that written in 1784, by *C. Tatham*. It is a letter couched in terms of friendship, written by a cousin who was well acquainted with the testator. It inquires affectionately after several members of his family who were living under the roof of Mr. *Marsden*. Mr. *Marsden* is addressed in the language of respect; not an expression is contained in it showing that the writer considered him other than a person of intellect equal to his own. The relationship in which he stood would have prevented him so treating Mr. *Marsden*, if he had considered him of weak and imbecile mind, and incapable of managing his own affairs. He was the brother of the lessor of the plaintiff, who claims as the heir-at-law of Mr. *Marsden*; and, although it does not appear whether older or not than his brother, he had a deep interest in the incompetency of Mr. *Marsden* to make a will, if such incompetency existed. The letter of Mr. *Marsden* to

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C. Tatham contains proof sufficient to satisfy me that Mr. *Marsden* had dealt with his cousin's letter. That he corresponded with him, is clear. It acknowledges the receipt of a map from him; in it he mentions a former letter that he had written to him, with an account of his nurse's death; and in allusion to and noticing the kind expressions in the postscript of *C. Tatham's* letter,—“Pray give my kind love to my aunt, my brother, and my cousin *Betty*,”—Mr. *Marsden*, in his letter to him, says, “My aunt has had very poor health since you left *England*; she has scarce ever been well; I am in hopes that she is getting better again. I think that change of air and a journey would be of service to her. We had an account of poor Mrs. *Smith's* death; she died at *St. Alban's* on the 7th instant. My aunt has had a letter from your brother *Harry*; he is very well.” Now, I cannot read this letter without considering this part of it as intended by Mr. *Marsden* to be and as amounting to an acknowledgment of the letter of 1784.

The next letter in point of date is that of Mr. *Marlon*, in 1786. The writer was at that time the vicar of *Lancaster*, and acquainted with Mr. *Marsden*. The letter is on business, and it is couched in terms which show that the subject matter to which it referred was not of the most pleasant kind. It states the necessity that some agreement should be come to between Mr. *Marsden* and the parish or township, or disagreeable things would unavoidably happen. Mr. *Marlon* recommends that a case should be settled by the attorneys of the respective parties, and laid before Counsel, to whose opinion both sides should submit, otherwise much trouble and expense would be occasioned to both parties; and requests that Mr. *Marsden*

would order his attorney to wait on Mr. *Atkinson* or Mr. *Watkinson*. It is addressed to Mr. *Marsden*, at *Wennington*. Mr. *J. Barrow* was at the time the attorney of Mr. *Marsden*; and in the handwriting of that gentleman is indorsed, “20th *May* 1786, letter from Mr. *Marton* to Mr. *Marsden*.” Upon what fair ground can it be contended that this letter was not admissible? Mr. *Marsden* was the person to whom Mr. *Marton* would address his request; and it is shown that he did so; and, from the words, “I am, Sir, with compliments to Mrs. *Cookson*,” with which he closes his letter, it appears to be clear that it was intended to be delivered to Mr. *Marsden* personally. It is found, with its seal broken, in the bookcase of Mr. *Marsden*, the depository of many others of his letters and papers, and has been dealt with in the way requested and pointed out by the writer. It is placed in the hands of Mr. *Marsden*’s attorney, and it is marked by him as a man of business would authenticate any document which had been acted upon by him in the matter to which it referred.

Then, the last letter is that of the Rev. *Henry Ellershaw*, of the 3d of *October* 1799. The writer had been the curate of the chapelry of *Hornby* for several years; he had been appointed by Mr. *Marsden*; and by the letter in question he resigned the preferment in terms of respect, affection, and gratitude, into the hands of his patron. I will not call in aid as a proof the truth of the contents, as to the competency of Mr. *Marsden*, the sacred character of the writer, and the reverend person who was present at the time the letter was written; nor will I attempt to rely upon the improbability, I might say impossibility, of the one having used, and the other having sanctioned, the use of the terms to Mr. *Marsden* con-

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tained in this letter, if there had been any ground for supposing that he was at the time the weak and incompetent person it was sought by the lessor of the plaintiff to show him to have been; although such considerations were, upon the hearing of this matter on a former occasion, elaborately urged and forcibly relied on by one of my learned Brothers, for whose knowledge, derived from a long experience, I entertain the highest respect. I have abstained from so doing, because it appeared to me that this case could be brought within the strict rule which I prescribed to myself for my guidance in forming my judgment upon this question, and to avoid any doubt that might be raised upon the supposed difference that is said to exist between the rule of evidence upon inquiries of this nature in the Ecclesiastical Courts and those of the Common Law. It is contended that no answer is shown to have been sent by Mr. *Marsden* to this letter; and although I admit such appears to have been the case, I rely upon bringing it within the rule by the acts of Mr. *Marsden* respecting it. The evidence applicable to it is that which I have before relied on as common to the three, and in addition to it is the material fact of the resignation of the preferment by Mr. *Ellershaw*.

Upon the whole, from the fullest consideration I have been able to give to this question, I have arrived at the conclusion that the three letters were received by *Marsden*, and so dealt with by him as to bring them within the rule by which their admissibility is to be tried; and my opinion therefore is, that they were evidence upon the issue raised between the parties in the action, and ought not to have been rejected.

Mr. Baron *Parke*:—I do not think it necessary to trouble your Lordships by repeating at length the reasons which I gave in the Court below for the opinion that none of the three letters is admissible in evidence. As the printed cases contain copies of the judgments delivered in the Exchequer Chamber, and I do not find any reason for varying or qualifying the opinions I expressed, I will therefore state very concisely the grounds upon which I conclude that the three letters were properly rejected.

These letters are sufficiently proved to have been written and sent to the house of the deceased by persons now dead, and they indicate the opinion of the writers that the alleged testator was a rational person, and capable of doing acts of ordinary business. But it is perfectly clear that in this case an opinion not given upon oath in a judicial inquiry between the parties, is no evidence; for the question is, not what the capacity of the testator was reputed to be, but what it really was in point of fact; and though the opinion of a witness upon oath as to that fact might be asked, it would be only a compendious mode of ascertaining the result of the actual observation of the witness, from acts done, as to the habits and demeanour of the deceased. Nor is the evidence the more admissible because the persons writing the letters do not merely express an opinion in writing, but prove their belief of it by acting upon it to the extent of sending the letters and putting them in the course of reaching the person addressed. After all, it is but an expression of an opinion vouched by an act, and by an act not so strong by any means as others done to third persons which are allowed on all hands to be inadmissible; not even so strong nor so confirmatory of the truth of the com-

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 not given on
 oath in a ju-
 dicial inquiry
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munication as a simple letter written to another man. If the opinion of a person be of itself inadmissible, the act which only proves the belief of that person in its truth, and is irrelevant to the issue, except for that purpose, cannot render it admissible.

Besides that, there is another ground, and the only other ground on which these letters are argued to be receivable in evidence; and that is, that there was proof in this case of acts done by the testator in reference to these letters, or at least one of them, which render the contents admissible by way of explanation of those acts. Those acts are, the opening of two of the letters, and placing them in the supposed usual repository of the papers of the deceased, and the opening of the third one, and transmitting it to the attorney, Mr. *Barrow*.

No proof here
 that the acts
 of opening the
 letters, &c.
 were acts
 done by Mr.
Marsden.

The answer to this argument is, that there is no direct proof whatever of these acts being done by the testator; and, as to indirect proof, to infer that the testator did the acts, is to assume the very fact to be proved. All these letters are on the same footing, though the objection to the admissibility of the last is, at first sight, not so apparent. If there were a specific issue, or it became material in any issue as to the property of the deceased, in his lifetime, or after his death, to inquire whether he opened the letters addressed to him, and communicated one to Mr. *Barrow*, it would be inferred that Mr. *Marsden* did so. But why would it be so inferred? Because, in any inquiry not upon the subject of competency, it would be presumed that he was capable of these acts of business; and upon that ground only. But here the only question is, whether he was capable of doing these acts. For the purpose of showing his capacity to make a will, the evidence is offered; and, to prove

that, a letter found in the repository, in an open state, with the indorsement of Mr. *Barrow* upon it, is produced to show that the testator was competent to open the letter and to read it over, and to refer it to his attorney. If it be asked 'to use all this as indirect evidence, that is, as an inference that he did the acts, how can I so use it, except upon the ground, that, if he was capable of such acts of business, it is to be presumed that he, and not some one else, did this? But that is to assume the degree of competence which the facts are adduced in order to prove. The argument, then, proceeds in a circle—because he had sufficient ability to do these acts of ordinary business, therefore it is to be inferred that he did them; and because he did them, it is to be also inferred that he was of sufficient ability to do these acts of ordinary business. No such inference can be made without an assumption of the very fact in question. It is said that the other facts which are stated in the bill of exceptions are sufficient to raise an inference of competence, and therefore to prove that the testator did the acts of opening and depositing the two letters, and of transmitting the third to Mr. *Barrow*; but that is a fallacy, because the question as to the admissibility of the evidence is, whether these particular facts do of themselves conduce to prove competence; for in no other way are they receivable in evidence. Upon the whole, and under these circumstance, I am therefore of opinion that all the three letters were properly rejected.

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All the letters
 properly re-
 jected.

Mr. Justice *Vaughan*, after stating the question, said: (*Vaughan, J.*)
 —In approaching the discussion of this subject, after every argument has been exhausted, both at the bar of the House and by my learned Brothers who have

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preceded me, which talents or research could supply, and where so little of authority has been found to guide our steps, I should be without excuse if I trespassed at any unreasonable length upon your Lordships' time.

The question for the determination of the jury was, whether the testator, from his attaining to competent age in the year 1779, was, down to and at the time of making his will and codicil respectively in the years 1822 and 1825, of sound mind, memory, and understanding, and capable of executing a will. So large and comprehensive an issue, embracing a period of not less than forty-six years of the testator's life, made all that he said, all that he wrote, and every act he did, relevant and pertinent to the proof of it.

The letters not evidence, as the mere opinions of the writers.

Now, it appears not to be disputed that the letters which are the subject of the present inquiry, considered merely as the expressed opinions of the several writers, are inadmissible in evidence. They are not sanctioned by the solemnity of an oath. They are not subjected to the test of cross-examination. And they lie not within the boundary of the great rule of evidence, which requires the presence of both these circumstances. Considered, therefore, as independent evidence in the character of expressed opinions, they are liable to all the objections to which hearsay evidence is exposed. But we are called upon to give them greater weight in the character of acts superadded to opinions, or, as it is expressed by Counsel, as treatment of the testator by those who knew him. Now, the term treatment, as properly and commonly applied, intends no more than the conduct of one man to another. A more complex notion is involved in it, when used in its loosest sense; it then conveys the idea of the acts and conduct of one party, leading to

Nor even as acts proving their treatment of the person to whom the letters are addressed.

and met by the acts and conduct of another. If the word treatment, as it is insisted on in the discussion, is intended merely to convey the idea of acts performed by those who wrote the letters, expressive of their opinions, the argument in favour of their admissibility has not, I conceive, based itself upon firmer ground. Acts performed by strangers, expressive not merely of opinion, but of the strongest conviction, even in cases where such conviction conflicts altogether with the interest of the person entertaining it: even such acts as these the law will not allow to be presented to the minds of jurymen as evidence. They are merely opinions expressed in different language, in the language of conduct, instead of the language of words. They may be acts involving a great sacrifice of personal interest, as, the payment of a policy of insurance by an underwriter, on a marine loss; and therefore, as moral evidence, they may be very cogent. Yet does the law, more rigid and inflexible, resist the weight of such moral evidence, although, in the ordinary transactions of life, common sense and experience might possibly yield to it. As acts of strangers, the law regards them as personal admissions, which cannot affect third parties; as the opinions of strangers, they bear the general insufficiency and infirmity of hearsay evidence, without any claim to the privilege which in some peculiar subjects of inquiry is extended to that class of proof. Thus, conceding in favour of the argument what is most questionable, viz. that a letter written and sent implies an act performed, as distinguished from a declaration made, yet still does it seem clear that the acts of a person, however pregnant with opinion, cannot be offered in evidence as proof of the truth of that opinion, where the issue lies between other parties.

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Such seem the legal consequences if we interpret the word treatment, as insisted upon in the argument, according to its strict signification, "as the conduct of one person to another."

The case, I think, is not assisted by such a view of the matter ; and therefore we are forced into contact with the other meaning with which it may be invested, as implying the conduct of one person to another, leading to and met by certain acts and conduct on the part of such other person. And it must be confessed that, if any acts on the part of the testator can be proved, either by letter or from other sources, all declarations and writings which tend to explain such acts may be put in evidence.

Where any facts are proper evidence upon an issue, all oral or written declarations which can explain such facts, may be received in evidence.

The principle, then, upon which alone the letters can claim admission, is the following ; that, where any facts are proper evidence upon an issue, all oral or written declarations which can explain such facts may be received in evidence. I have stated it thus, because I conceive that the decision of the present question must rest upon this principle. The rule cannot be adequately satisfied, nor its meaning fulfilled, unless we are convinced of the presence of two conditions—first, that there were acts done which would constitute good primary evidence—secondly, that the oral or written declarations throw light upon and explain such acts.

Here there is fair ground of inference that Mr. Marsden did some acts with regard to these letters.

Then, in the first place, it may be asked, is there any evidence of acts done by the testator upon the letters in question, or any one of them ? (for any acts of the testator are of course evidence). I am of opinion that there is fair ground for such inference. Certain letters are found in a man's private room, in the cupboard of his bookcase, with the seals broken, in company with other letters, some of which have indorse-

ments in his handwriting, and others of which have been answered in his handwriting. Do not all these facts conspire to prove, at least almost irresistibly to invite the conclusion, that the letters in question had their seals so broken and were perused by him? It has been argued at the bar, that, to raise this presumption, we assume the man's competency, which is the point to be proved. A little reflection will, I think, show this reasoning to be vicious. In the first place, the argument does not assume any competency at all; and, in the second place, the competency which is inferred is not the competency which is disputed, namely, the competency to make a will. First—we do not assume any competency, we infer it, and for that very reason we do not assume it, because we infer it: for, nothing is to be assumed which is not taken for granted without any proof; and nothing is inferred which is so taken for granted. And I infer that the testator was competent to open the seals and peruse the letters, because the answers and indorsements to the other letters in his handwriting prove him competent so to do; and we conclude that he actually did open and peruse these letters, because the fact of finding them opened in his private drawer, and in the company of letters which he must be taken to have opened and perused, furnishes cogent evidence that he opened and perused these. But we do not thereby even infer him competent to make a will. We conclude him competent to open and read a letter; but that is not the point at issue, unless these two competencies are identical: and whoever should contend that they are so, must be prepared either to deny that the answers and indorsements are in the testator's handwriting, or to admit that the discovery of such answers, taken by itself, proves the testator competent

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to make a will ; for a man cannot be supposed to answer what he did not peruse.

The opening and purusing a letter are certainly acts, and therefore they stand upon the same footing with all the other acts of a man, and may be properly and primarily admitted. How far they are valuable elements in a body of proof, is another question, quite distinct from the present. They are facts admissible in evidence to establish the point at issue ; and therefore they clear the way for the introduction of any oral or written declarations which can explain them, and for none but such as do serve to explain them. And thus we are carried on to the question, whether the contents of the rejected letters, or any of them, can throw any light upon and explain the acts so established : if they can, then of course they may be admitted ; if not, they must be rejected.

Now, it is very essential to bear in mind what is the fact in evidence, with regard to the three letters generally (for, one of them—that with the indorsement of *Barrow* upon it—may be considered upon distinct grounds), in the explanation of which the contents are called in aid. The only fact at which we have arrived is, that of the testator having opened the letters, and probably having cast his eye over the contents. Can we shed any new light upon this fact by the contents of the letters? I think I am warranted in saying that the contents of a letter cannot tend to clear up, or explain, or give any stamp of character to any act which does not from its nature import that the party acting apprehended or misapprehended its contents. If, for instance, a person has answered a letter, the contents of the first letter reflect a strong light upon the second. The party writing the answer must have had, or believed himself to have had, the

contents of the first letter in his mind. So, if it can be shown that a man has done any act in consequence of having read a letter, that letter will be a very valuable instrument to lead the mind to a proper estimate of the purpose or wisdom of such act. In all these cases, there is some act flowing from an apprehension or a misapprehension of the contents of the letter; and the contents are necessary to enable us to form a judgment of the soundness or absurdity of such apprehension. Or, if a person is proved by gestures or words to have shown certain signs of passion or apathy upon reading a letter or hearing some intelligence, then those gestures or words, or that apparent disregard, will prove how he apprehended such contents; and such contents may therefore be received to lead us to an opinion of his temper or his sanity. But, in such cases, it is not the perusal of the letter, but the acts and conduct at the perusal, which are illustrated by the subject matter of the letter; and there must be evidence of some such acts or states of mind, in order to justify the admission of such declarations. In some cases, indeed, the mere omission to do any thing upon the receipt of intelligence, might be proof of a state of mind. In the present case, then, there is no fact presented to us but that of mere perusal and casting the eye over the contents. There is nothing, as applied to two of the letters, on which we can fairly found the presumption that Mr. *Marsden* acted as upon an apprehension of what they contained.

From any thing before us, we cannot conclude that he understood them, or that he misunderstood them. There is evidence that he opened them; but, were we, in the absence of independent evidence, to assume that he understood them, we should be perhaps assuming the question of his sanity: for they might

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contain a discussion on some newly invented machinery, on a question of political economy, or some problems in education generally. Were we to assume that he did not understand, we should be running into the contrary extreme. I am of opinion, therefore, that, with respect to two of the letters, although there is proof of acts performed upon them by the testator, yet they are not such acts as can in any degree be illustrated or explained by the contents of the letters themselves: and consequently that such letters are not admissible.

There is one letter, however, that with the indorsement of *Barrow* upon it, produced under different circumstances, and on which I think it may be inferred that acts of a different character have been performed. It is found in company with the others, attended therefore by the same circumstances in general, but also bearing an indorsement in the handwriting of the testator's attorney. Now, it is evident from such indorsement that it was placed by some one in the hands of this third person. The same presumption is, of course, raised upon this letter as upon the other two, viz., that it was opened and perused by the testator; and, beyond this, we have the fact, clearly ascertained, that it was put into the hands of a third person. Is not, then, the conclusion forced upon us, that it was the testator who performed this act upon the letter? and if so, is it not in all respects such an act as the contents of the letter are calculated to throw light upon? It is very different from mere perusal. It is an act performed in consequence of perusal, and it necessarily implies that the testator understood its contents to be of such a nature that it would be discreet and proper so to deal with it. By presenting such a letter to the intelli-

gence of a jury, we enable them to form a judgment whether such dealing with such a letter were really discreet and proper; and so far they are assisted to an estimate of the testator's state of mind. They cannot pronounce upon the rationality of the act performed, until light is thrown upon it by the letter in question; and therefore, such letter, falling within the principle of *a written declaration calculated to explain a fact which is proper evidence in the cause*, was, I conceive, admissible, and therefore improperly rejected.

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Mr. Marton's
 letter admis-
 sible.

Mr. Justice *Littledale*:—The first question that arises upon these three letters, is, whether they were found under such circumstances as that their being receivable in evidence can be at all inquired into. They were found in a cupboard under a book-case in Mr. *Marsden's* private room; a place wherein many other letters addressed to Mr. *Marsden* were found, some of which were indorsed by him, and to some others of which, letters in answer had been written by Mr. *Marsden*. The place of custody in itself seems a reasonable and probable place where such letters might be deposited; more cannot be required: the time when they were found is not precisely ascertained; nor could it in my opinion be reasonably expected to have been ascertained with more precision: and therefore I think the custody and time of finding sufficient to let in the further evidence.

Were these
 letters found
 under such
 circumstances
 that their
 being receiv-
 able in evi-
 dence can be
 inquired into.

The custody
 and time of
 finding are
 sufficient to
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Taking the letters collectively, without reference to the particular circumstances of each, it is found they are written by friends of his, addressed to him, containing expressions towards him by the persons who wrote to him, which might be expected and ordinarily

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looked for between one person in a similar situation and station of life, and another, upon the various subjects of common-place information and business, and of good feeling and gratitude; subjects varied in themselves; and on each of these the writer expresses himself in such manner as one man would naturally express himself to another.

The letters
constitute an
expression of
the opinion of
the writers.

The rationality of the writer is admitted; that of the person addressed is the matter in dispute: and the question is, whether these letters are admissible in evidence for the purpose of investigating that point. Now, the opinion of the writer, as far as the mere letters go, is in favour of the person addressed being rational and competent to understand them. The letters also bespeak a great private acquaintance with Mr. *Marsden*. There is, therefore, I assume, upon the whole, an expression of the opinion of the writers, who appear by the letters to have competent means of judging of the ability of Mr. *Marsden* to understand them. Suppose the writer had addressed a letter, as nearly similar as the circumstances would admit, to a third person; or suppose he had met Mr. *Marsden* in company, or in the street, and had addressed the same language to him, and there had been no answer from Mr. *Marsden*; or had addressed the same observations to another person: every one of these cases which I have just put would have amounted to an expression of an opinion. But would it have amounted to anything but mere opinion? It is not upon oath. If a party were alive and could be cross-examined, he could be examined as to the ground of his belief of the competency. But letters of this sort are much less likely to express the real sentiments of the writer than if written to a third per-

son, as it is not likely that the writer would in letters to the party himself indicate anything tending to a doubt of his capacity.

It is said to be an act done; and there are many cases where an act done may have more effect than a verbal declaration; but, to have that effect, it must be something done towards a matter of business in progress or contemplation. But here, the only act done is, writing a letter, containing nothing more than an expression by word of mouth would do, which does not fall within the usual meaning of acts done, which are sometimes made evidence when done even by third persons.

But then it is said to be evidence of treatment by the writer of the letter. It does not appear to me to fall within the meaning of the expression. *treatment*. By treatment, I should understand to be meant the manner in which, when two persons are living in society, one conducts himself towards another in some way, so that the conduct of both parties is to be considered, and which may be shown by common instances of intercourse, or by mutual correspondence, or by letters, in which, though there be no mutual correspondence, one person has so conducted himself, either well or ill, as to draw forth from another a letter expressive of approbation or disapprobation of the writer, as the case may be; but, if it be a single letter addressed by one person to another, and the question is as to the competency of understanding of the party addressed, I cannot consider it in the light of *treatment*; it comes to nothing but opinion. In that point of view, in the absence of the power of cross-examination, the mere opinion of the party goes for nothing, and the only thing to be attended to is, the manner in which the thing done is acted upon by

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This opinion is not admissible.

Nor is it evidence of treatment of Mr. Mursden, by third persons.

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the party to whom either the letter or the language is addressed. Numerous illustrations of this have been given, which it is not necessary to take into consideration. But, on a question of competence, where the party who alleges the competency is bound to prove it, he must show that the person has done some act upon this manifestation of opinion, which indicates that he understands the manifestation; if he does so, it is admissible in evidence, and the effect of it will be left to the jury. But, unless it be proved that he has done something upon this manifestation in the conduct of other persons, shown by letters or conversation, or other things, to evince that he had a competent mind to understand the effect of them, then these opinions or manifestations go for nothing, and cannot be submitted for the consideration of a jury.

It is said, that in cases of crim. con., letters found in the possession of the parties have been admitted in evidence. That is not a case of competence, but to show on what terms the parties lived. So also, in other cases, letters found in the possession of persons are admitted: but there also the competence is not in doubt, but the question is, whether the letters show that the parties are concerned in the transaction which is the subject of the inquiry. But where the inquiry is, whether the person be competent or not, you cannot infer his competency from the possession of letters, till you hear that he has in some way acted upon them; because you would then begin by assuming his competency, in order to prove the very fact in issue.

The rule in the Ecclesiastical Courts is not to be adopted in the Courts of Common Law.

It has been urged that it is the practice of the Ecclesiastical Courts to admit letters similarly circumstanced, to prove the competency of persons to make a will. Supposing the practice to be well established, and to be shown to have existed a considerable time,

I should not think we are, therefore, to adopt their rule in the Courts of Common Law. They have a different mode of proceeding in those Courts.

It may be said that the mere opening of the letters is sufficient evidence of competency to let them in as evidence. I think not; for, assuming them to have been opened by Mr. *Marsden* himself, that is not sufficient to show that he understood them. And again, it may be said, that as a great many letters have shown that Mr. *Marsden* acted upon, by indorsing them, and that as to other letters he had sent answers, it was to be presumed that he understood these letters also: but I think not; I think his conduct as to each letter must speak for itself. It may be said, that if there were 20 letters which Mr. *Marsden* had acted upon, and only one in the predicament of these three letters, it must be presumed that he had acted upon that one; but suppose, on the other hand, there was only one which he had acted upon, and twenty in the predicament of these three; should it be inferred that he had acted upon the twenty? I think each letter must be considered singly.

After stating so much of the general nature of the rules of evidence as is applicable to letters of this description, I shall now examine the particular letters which are the subject of your Lordships' question. And, first, as to the letter of *C. Tatham*, written in 1784 to Mr. *Marsden*: that letter is written in a way one relative might be supposed to write to another under similar circumstances, and does not express any sentiments which bespeak any opinion contrary to the competence of Mr. *Marsden*. No indorsement is made upon that letter by Mr. *Marsden*; but, in 1787, he writes to *C. Tatham*, mentioning the receipt of another letter from *C. Tatham*, but making no allusion to the

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Even assuming Mr. *Marsden* to have opened the letters, that does not show that he understood them.

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one in question. It has been contended that this letter is admissible as forming part of the correspondence. If I could discover that it did form a part of the correspondence, I should think it admissible, although it was not noticed in Mr. *Marsden's* letter of 1787 ; but I cannot see anything to indicate that it did form part of the correspondence ; and my opinion is that it ought not to have been admitted in evidence. Next, as to the letter of Mr. *Ellershaw*—it is one of great feeling and gratitude, and very proper to be written on the occasion ; but there is no evidence of Mr. *Marsden* having acted upon or recognized it ; and that also, I think, should not have been received in evidence. As to the letter of *Oliver Marton*, that is not indorsed by Mr. *Marsden* himself, but it is so by Mr. *Barrow*, his attorney, and therefore it is evident that Mr. *Barrow* had acted upon it ; that is said to be no evidence that Mr. *Marsden* had authorized him to do so, or ever knew that he did ; for, Mr. *Barrow* may have himself of his own head opened the letter or seen it after it had been opened by Mr. *Marsden*, and, seeing his name mentioned, or that he was alluded to in it, and that the business proposed was proper to be done, he may have done it, and written his name upon it, which indicates his acting. It is said that, if you infer that Mr. *Marsden* opened the letter, and directed Mr. *Barrow* to do what is mentioned, you infer that Mr. *Marsden* was of competent mind to do these acts, which is the very thing to be proved ; and that therefore, to show that he is competent, you really infer that he is competent ; for, unless you show that he gave the directions to *Barrow*, you have no right to assume that he did so. But it does not appear to me that, by admitting the letter, you do infer his competence. Here is a letter addressed to Mr. *Marsden*,

recommending that his attorney should transact a certain business; Mr. *Barrow* is his attorney, and you find by Mr. *Barrow's* indorsement, that he had attended to the directions of the letter: the very thing therefore is done which was recommended by Mr. *Marton*, to Mr. *Marsden*. Suppose Mr. *Atkinson* or Mr. *Watkinson* had been alive, and had been called to prove that he and Mr. *Barrow* had a negotiation on the subject of the letter; and the evidence had stopped there, and nothing had been proved as to Mr. *Marsden's* knowledge or assent to what had been done; it might still be said to be no evidence; but however slight the effect of the evidence, I think, as the thing was acted upon which was recommended to Mr. *Marsden*, that this letter ought to have been received in evidence.

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Marton's letter
 admissible, as
 the thing re-
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 acted on.

Mr. Justice *Park* :—I do assure your Lordships, it always gives me great pain to differ from my learned Brothers in point of law, especially when the number differing from me is so great. In expressing my reasons for that dissent, I shall endeavour to be extremely short, and confine myself to the rejection of the letters: for, the question propounded to Her Majesty's Judges, after stating all the facts necessary to raise the question, is this, whether the three letters mentioned in the case, or any of them, be admissible in evidence on behalf of the defendant below.

To that question my answer is in the affirmative. First, let us see in what place these letters were found. It is stated, that, after Mr. *Marsden* died, many letters addressed to him by various persons were found with other papers in a cupboard under his book-case, in his private room; that to many of these letters answers in the handwriting of and signed by

All the letters
 are admis-
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Mr. *Marsden* were found ; that on some were his indorsements ; and such letters were read : but that, as to the three letters in question, they stand on a different footing, for upon none of the three is, I admit, the handwriting of the testator himself to be found. They were, however, found in the same cupboard, and it is only upon the question of place I am now treating. It was a fit place, in a gentleman's own private room, where he was wont to be, in which to deposit letters or other papers that he received and thought proper to preserve. It was asked in argument, "How do you know that Mr. *Marsden* deposited all the letters?" That is a fair observation, and fit for the consideration of a jury, but in my opinion no ground for rejection. I think the papers which were found in the same place furnish presumptive evidence that they were placed there by the testator, there being no fraud stated or insinuated, nor any proof that other persons were in the habit of frequenting that room : indeed, the length of time since those letters were dated, seems to exclude all suspicion of fraud ; for no question had then arisen, nor for many years afterwards. It is supposed that the fact of Mr. *Marsden* having indorsed some of the letters is a decisive reason for saying that he never opened the letters in question. I must say, with all deference to those who thus argue, that this is reasoning against the usual practice and habits of mankind, and against every man's personal experience, unless we suppose that, in order to show that it has been read by him to whom it is addressed, every letter received must be indorsed. I am willing to admit, that, if there had been only a few letters found in the place where these letters were found, and of recent date, and that the inquiry as to sanity embraced only a few of this

gentleman's latter years, perhaps I should have wavered in my opinion : but the lessor of the plaintiff having chosen to throw the charge of mental incapacity over the whole of Mr. *Marsden's* life, almost *à nativitate*, I think this opens so wide a field for investigation that it gives those who contend for the production in evidence of those letters of ancient date a right to show how he was at that time treated by relations, friends, and neighbours : and, if the foundation be thus shaken, by showing that he was considered as sane thirty or forty years ago, it tends to weaken the evidence of those who say that he was always an incapable man. If letters had been found in this depository, addressed to him by literary and scientific men, with no doubt of their authenticity, consulting him upon some point of science or literature, I cannot bring myself to think that such letters (always guarding myself against fraud) would not be good evidence to prove sanity : what effect they might have upon the mind of a jury is another question. I almost think it was not worth while to insist upon the admissibility of the letters in question, or to insist, on the other hand, upon their rejection ; but here unfortunately we are obliged to discuss it. I admit the rule, and fully adopt it, as laid down by the Court of King's Bench in this case, that it ought to appear that some act (that Court admitting that the least act done would be sufficient) was done by the testator with reference to the letters, to make them evidence : for such act could not be explained without reference to them, and, if received, no rule of law could prevent their being submitted for the consideration of a jury. I insist, according to that proposition, that some act was done by him as to the three letters in question, but most clearly as to one of them.

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It is a proper rule that, in order to make the letters evidence, it ought to appear that some act was done by Mr. *Marsden* with reference to them :

Some act was done by him in this case.

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Let us first see who the writers were : one, a cousin, in a distant part of the globe ; another, a respectable clergyman, whose ministrations Mr. *Marsden* attended ; and the third, another respectable clergyman resident at *Lancaster*, writing to Mr. *Marsden* on secular business, but showing by his mode of addressing him that he treated him with familiarity and affection. The time when these letters were written, one in 1784, another in 1786, and the third in 1799, precludes all idea of a view to a question which did not arise till above forty years after they were written. “ It seems to follow,” says Mr. *Starkie*, “ that all the surrounding facts of a transaction, or, as they are usually termed, the *res gestæ*, may be submitted to a jury, provided they can be established by competent means, and afford any fair presumption as to the question in dispute ; for, so frequent is the failure of evidence from accident or design, and so great is the temptation to conceal the truth and misrepresent facts, that no competent means of ascertaining the truth can or ought to be neglected, by which an individual would be governed, and upon which he would act with a view to his own concerns in ordinary life.” Taking this rule laid down in Mr. *Starkie*’s excellent book to be a sensible and well-considered rule, I beg your Lordships to take under your view whether competent means have not been rejected tending to show the opinions of those respectable persons by whom Mr. *Marsden* was addressed, and who treated him as a sane, and, though not a bright person, yet as a man competent to all the ordinary concerns of life. It seems to me impossible to suppose that persons of character and intelligence, who were well acquainted with him, wrote to an incompetent person such letters as they would not have addressed to any but a person whom

It cannot be supposed that persons of character and intelligence would write to a person considered by them to be incompetent.

they supposed to be of sound mind ; and this covering the long period in which he is said to have been unfit to associate with such men as his situation in life entitled him to associate with. Independently of the contents of the letters themselves, which I shall presently comment upon, the length of time during which they have existed, proves to me that Mr. *Marsden* opened and put them safely away. If he had been a weak and silly idiot, he might perhaps have broken the seals and thrown the letters down, and they would have been taken away as waste paper by the domestics ; but the seals are broken and the letters are carefully put away by Mr. *Marsden* himself, and not destroyed.

The first important letter is the one written in the year 1784, by a cousin then in *America*, to the testator ; the writer begins and concludes it with terms of great endearment and affection ; he gives a history of his voyage, the state of the country in point of health when he arrived at *Alexandria*, and alludes in general terms to his future prospects : in short, if the man to whom this letter was written was known by the writer to be an idiot from the earliest period, the writer must be a greater idiot than the receiver of it. But it is said there is no proof that Mr. *Marsden* did anything with this letter. It was marked as a ship-letter, with the *London* post-mark upon it ; it was found open, and in Mr. *Marsden*'s depositary. Why we are to suppose that the letter found open in a man's desk or cupboard, and written nearly fifty years *ante litem motam*, had neither been opened nor read by himself, on account of idiotcy, I own, as the late Lord *Ellenborough* once said, I have not optics to discover ; and at a time, too, when the litigating party, who is most blamed now,

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was then probably too young to have been a member of Mr. *Marsden's* family.

The bill of exceptions then states, that, amongst a vast variety, in the same place, was found a draft of a letter in the handwriting of the testator, addressed to this cousin, which, though not an answer to the letter I have just commented upon, shows that a correspondence was going on between these relations; for the letter of which this is a draft proves that the testator had received another letter from *C. Tatham* in the intermediate time: "You mentioned in your letter" (which must necessarily mean a subsequent letter to that of 1784, for nothing is stated in that letter of the things mentioned by Mr. *Marsden* in this draft) "that you have sent me a small quantity of dried fruit: I received nothing but the map, for which I thank you. My aunt has had very poor health since you left *England*; she has scarcely ever been well. I am in hopes she is getting better again; I think that change of air and a journey would be of service to her. We have lately had an account of poor Mrs. *Smith's* death; she died at *St. Albans*, the 7th instant. My aunt has had a letter from your brother *Harry*; he is very well. It is reported that your acquaintance Mr. *Bradshaw*, is going to be married to a Miss *Fell*, of *Lancaster*; whether there is any truth in it or not, I cannot tell. I suppose you have received my last letter" (therefore he had written before), "wherein you will see an account of your nurse's death." Now, here is a letter which could only be written by a man of some intelligence, and containing a number of occurrences, which, though of no moment to a stranger, he judiciously felt would be interesting to a relation on the other side of the *Atlantic*, removed from his family and friends.

The next letter I shall mention, though the last in point of date, written 39 years ago, namely, in 1799, is that from Mr. *Ellershaw*. I know not, my Lords, what other men feel; but, speaking for myself, I should say that a person of the sacred function writing such a letter as your Lordships have already heard read, to one who was, as the case supposes, a manifest idiot, expressive of such sentiments as to Mr. *Marsden's* piety, beneficence, and hospitality, must be a knave or a hypocrite, and a disgrace to his holy calling, if he thought him incapable of managing his own worldly affairs; and this too at a time when Mr. *Ellershaw* was about to quit his charge near the testator, and could have no secular motive to induce him to act the hypocrite, even if not restrained from doing so by higher considerations.

Now we have arrived at Mr. *Marton's* letter; and, upon every principle laid down by some of the Judges, and recognised by the Judges of the Queen's Bench, I cannot conceive how it could be rejected. The letter bears date 52 years ago, namely 1786. Mr. *Marton* was a man of large fortune, and the vicar of *Lancaster*, where he lived, nine miles from *Wennington*, where Mr. *Marsden* then resided; and, from what I knew of him—and I knew him well—he was the last man to put pen to paper upon business to one whom he must have known, if there is any foundation for it, to be an idiot. It begins, “Dear Sir,” showing an intimacy; and it concludes with requesting an answer—an answer, my Lords, from a person said to be totally unfit to manage his affairs. Mr. *Marton* must have been as mad as Mr. *Marsden*.

Well, then, where is this letter found? In the same repository, open; and, more than this, the letter is dated 20th *May*. Mr. *Marsden* is addressed as

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then living at *Wennington Hall*, about 10 or 11 miles from *Lancaster*; he must have received it on the very day it was written, and he must have read it; for it desires him to order his attorney to do so and so; that attorney, Mr. *Barrow*, residing in *Lancaster*; and we find his indorsement upon it—"20th *May* 1786, letter from Mr. *Marion* to Mr. *Marsden*." It appears that Mr. *Marsden* immediately complied with Mr. *Marion's* desire; for, on that very day it was written at and sent from *Lancaster*, we find it back again in the hands of Mr. *Barrow* at *Lancaster*; no doubt to do the needful upon it; and that letter is found in the repository of the testator. Why is it to be suspected that some person at that distant period—about half a century from this time—opened that letter, and sent it to Mr. *Barrow*, unknown to Mr. *Marsden*, and afterwards put it amongst his papers to furnish evidence to support a will half a century afterwards, and which will did not exist till nearly 40 years after the writing of Mr. *Marion's* letter? If, then, this be too absurd a supposition, surely here is recognition sufficient to satisfy the requisition of the Court of Queen's Bench. Much of the argument against the propriety of admitting these letters has turned upon a variety of conjectures and suppositions wholly unfounded, imputing fraud to persons who were hardly in existence at the time when those letters were written. I cannot gain sufficient information about the practice of the Ecclesiastical Courts of this country, to warrant me in drawing the decisions of those Courts in aid; but my opinion, which I submit with all diffidence to your Lordships, differing as I do from so many of my learned Brothers, I have declared upon my conception of the rules of our own law, in a case where no allegation of fraud appears. I am,

Without adopting the rules of evidence of the Ecclesiastical Courts, these letters are evidence.

therefore, bound to state to your Lordships my opinion that these letters should have been received in evidence; and therefore that the judgment of the Court below was erroneous.

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Lord Chief Justice *Tindal*:—The question proposed (Tindal, C. J.) by your Lordships for the opinion of Her Majesty's Judges, has been so fully discussed by my learned brethren who have preceded me, that I shall endeavour to compress within as small a compass as is consistent with perspicuity the reasons for the opinion at which I have arrived; namely, that of the three letters embodied in the question put to us, one only, that is, the letter written by Mr. *Marton* to the testator, was admissible in evidence; and that such letter ought to have been submitted to the jury by the learned Judge who tried the cause. I take the rule of law on this subject to have been properly laid down by the Court of King's Bench on a former motion for a new trial in this cause, viz. that letters written and sent to the testator, concerning whose competency the inquiry arises, from parties acquainted with him, are not of themselves, and without some act of the testator in respect of such letters, admissible in evidence to prove his competency; but that any the least act done by the testator with reference to the letters produced, would give them admissibility. And I consider the ground upon which such rule is placed by the Court to be satisfactory, viz. that such letters amount to no more than treatment of the testator, without any proof of his being conscious of such treatment; or as amounting to no more than a parol conversation with him, which is not shown to have reached his ear; and thus to indicate no more than the mere opinion of the writer upon the state of mind

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Some act necessary to
 render the
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of the testator ; which opinion is inadmissible, upon the double ground, first, that it is not given upon oath, and, secondly, that it has not been subjected to the test of cross-examination. But, if it is once shown that the letters were read by him, so that he could exercise any act of judgment upon their contents ; or if it is shown that he did exercise any act of judgment and reason, as by answering them, or by acting upon them ; in each and every of these cases the letters are admissible in evidence ; such evidence varying in its weight upon the subject of inquiry, according to the degree of judgment and capacity which is imported by such acts done ; but all such letters being admissible to the jury, who will give the proper degree of weight to the evidence in each particular case. The question, therefore, with respect to the admissibility of the three letters, comes to this : Is there any evidence stated to us from which it can be inferred that the contents of these letters, or any of them, were ever perused by the testator, and by that means submitted to the exercise of his understanding and reasoning powers ? Or, is there any evidence of his doing any act with reference to them, which may, according to the nature of such act, import the exercise of a larger or smaller extent of reasoning power ?

No doubt appears to have existed in the minds of any of the learned Judges when the present case came before the Court of Exchequer Chamber, as to the propriety of admitting in evidence such letters as appeared to have been opened, and to have been indorsed in the handwriting of the testator himself ; and the only ground upon which such letters could be received, and the three letters now under consideration rejected, must have been, that the indorsing

of a letter—being an act ordinarily done by the party to whom it is addressed after he has perused it, and necessarily implying that he has made himself so far master of the contents as to have learned from it the name of the writer, or the date of the letter, or both (as the indorsement may purport),—is sufficient evidence to presume that the testator must have read the letter, and so far have understood the contents as to be capable of extracting these particulars. But, on no one of the three letters under investigation is there any such indorsement; and the question, therefore, is, whether there is any other act done with reference to them, or any of them, which is capable of supplying such deficiency, and showing that the testator exercised any judgment or understanding upon their contents.

With respect to the letter from Mr. *C. Tatham*, under date of the 12th *October* 1784, and the letter from the Rev. *H. Ellershaw*, under date of the 3d *October* 1789, I see no circumstance whatever attending them which indicates any the least act done by the testator respecting them, or any the least proof that he exercised his understanding or judgment upon them. They were never answered by him; so that this, the best and most convincing proof of his understanding, is wanting; they were never indorsed by him; and, when so many other letters were found in the same repository, both opened and indorsed, and these were not, the absence of this act of recognition makes against their admissibility. These two letters, therefore, do in my apprehension range themselves within the class of letters proved to have been written to, but not proved to have reached the understanding of, the testator; and upon the ground above stated I think them inadmissible.

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But the letter from Mr. *Marlon* does, as I conceive, stand upon a very different ground; for, as to that letter, the facts found by the jury show to my mind, not indeed by direct evidence, but by legal inference from the attending circumstances, that the testator did act upon that letter, and exercised some judgment upon it. That the letter reached Mr. *Marsden* at the time it was written, appears from its address to him at *Wennington* Hall, where he then resided, and from its having been removed with his other letters to *Hornby* Castle, where he died, and kept by him at the latter place in the same depository with his other letters and papers. That it was communicated to Mr. *Barrow*, his attorney, by somebody, appears from the indorsement in the handwriting of Mr. *Barrow*; such indorsement of the date of the letter, and the names of the writer and the party addressed, being precisely the mode in which a letter upon business would be marked by an attorney in the ordinary course after he had perused its contents. That, after such communication to the attorney, it was returned again to the possession of Mr. *Marsden*, is the fair inference from its being found there indorsed by Mr. *Barrow*; and, why should this letter be the only one of all the number which came to the hands of Mr. *Barrow*, except that it was the only one which appears by its contents was required to come to his hands? Now, the communication of this letter to Mr. *Barrow* was just the course which, in the transaction of the business to which the letter related, any party to whom such a letter was addressed would take. The communication of the letter to Mr. *Barrow* was of itself an intimation to him to see the contents of it performed; that is, to wait on Mr. *Atkinson* or Mr. *Watkinson*, to propose terms of agreement, or

to settle a case for Counsel. If no fraud or confederacy is to be imported into the case, and none can, for none is found by the jury, the inference to be drawn from what does appear, is, that the letter reached Mr. *Marsden*, that he did what the letter required him to do after reading it, and that it was returned back again by his attorney.

The ground upon which some of my learned brethren held this letter to be inadmissible, when, upon a former occasion, the case was before the Exchequer Chamber, was this; that, as the issue was directed to try the competency of mind of the testator, to argue upon his acting under the circumstances supposed as a reasonable man would act, amounts to an assumption of the thing to be proved. I must confess myself not in any way satisfied with the force of that objection. The proper question is, as it appears to me, whether a given state of circumstances amounts to and supplies the place of direct proof; and that question can never in any case depend upon, or have the least relation to, the form of the issue which is under investigation. If it had been proved by direct evidence, that Mr. *Marsden* had received the letter and opened it, had sent it from to his attorney, and that it had been returned back the attorney to him, no doubt would have existed as to the admissibility of the letter. The question now to be solved is, whether the circumstances proved are such as would naturally attend upon and accompany the fact of the testator's having acted to that extent upon the letter, so as to afford the fair and reasonable presumption that in fact he did so act.

These facts have their existence and their necessary relation to each other, and to the thing which is to

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It may be inferred that the letter of *Marsden* came into *Marsden's* possession, and so that letter is receivable.

be inferred from them, altogether independently of the question with respect to which they are brought forward. The nature of the inquiry therefore ought, as it appears to me, to be kept completely out of view. The strength of the inference depends altogether in every case upon the experience we have, that, in the ordinary course of the business of life, such and such facts are not found to exist without being accompanied by the existence of the fact with respect to which there is no direct proof. But, to import into this calculation the consideration that the inquiry regards a particular subject, is, not to give the ordinary and due weight to the circumstances themselves, but a varying and uncertain effect, dependent on the nature of the inquiry in each particular case; and, consequently, in the case before us, to hold that, if the inquiry had been of a different nature, the inference from the circumstances proved ought to be such as to establish Mr. *Marsden's* having acted with respect to this letter, and to render it admissible in evidence; but that, as the issue relates to his competency, such inference cannot be made, does appear to me to give a bias to the conclusion we are to draw from the nature of the question, and in so far to make an assumption against the sanity of the testator. No similar argument has, so far as my experience goes, ever been applied with respect to the deductions to be made from circumstantial evidence in the investigation of any other question; as, when the inquiry turns upon the guilt or innocence of a person charged with any offence, or in any other case.

I do not think it necessary to make any comment upon the assumption that the letter in question may have been put into the depository by fraud, or that

the indorsement of Mr. *Barrow* may have been procured by fraud, or that the management of the correspondence of Mr. *Marsden* was under the control of some third person; because, as no such facts are proved, we have no right to suppose them.

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Upon the whole, I think the fair inference to be drawn from the circumstances which accompany the letter written by Mr. *Marton*, is, that that letter came to the possession of Mr. *Marsden*, and that he acted upon it; and, upon this ground, I think that letter ought to have been admitted in evidence on the trial of the cause.

Lord *Brougham* :—I entirely agree with those who think that we are now called on to decide a question of very considerable importance, both with reference to the individual interests concerned, and still more with reference to the principle involved in the decision, applicable as it is to that great branch of the law of this country, the admissibility of evidence. In the present case, which is in some respects a case of the first impression, we have the misfortune to find a difference of opinion among the learned Judges, six of those who have been consulted in the course of the discussion having advised the rejection of the appeal, and the affirmance of the judgment of the Court below, while six have come to a contrary conclusion, deciding, though in different degrees, in favour of the admissibility of the evidence tendered, some being for admitting the whole, and some for admitting only a part. In this state of the case, I think that it becomes us deliberately to consider the arguments, in order that we may come to a safe and satisfactory conclusion. Nevertheless, having fully heard those arguments, I shall but discharge my duty to

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your Lordships, if, as it were, I break the case at present with one or two observations; and I hope it will not be deemed presumptuous in me if I state that my principal difficulty in making up my mind arises from feeling so little difficulty about the main question; so that, from not discovering any solid ground of doubt, I fear, and almost feel, that I must have overlooked some fact that was before the jury, or some point which has been considered by the Court. The question is this: Three letters are found in the repository of Mr. *Marsden*, and are tendered in evidence on a question concerning his sanity. All the letters are open. Two of them are without any indorsement, though they are in company with a number of others which have had his indorsement upon them. The third has on it the indorsement of Mr. *Barrow*, who was Mr. *Marsden's* attorney. Now, say the learned Judges who are in favour of the receipt of this evidence (differing among themselves, however, in opinion as to the degree in which this evidence is receivable), "we derive our ground for letting in these letters, from the fact that they were all found in the place where Mr. *Marsden's* letters usually appeared to have been deposited;" for if they go beyond that, and take the statements of the letters as if they were proved, and as if the facts to which they refer were facts in the case, *cadit questio*. We must not assume the facts in the letters to be facts proved in the cause; the question being, Shall these letters be let in, and shall these letters be received, and shall the facts therein stated be considered as facts in the cause? Nay, I can go further, and say, that if the letters were admitted, they would not prove the facts stated in them to be facts in the cause.

I can barely understand how the fact of these letters being found in Mr. *Marsden's* usual place of deposit for letters, would be sufficient to let them in, but if it is not to make them all evidence, I am unable to comprehend this rejection of two of them notwithstanding that fact, and at the same time the admission of the third, to which that fact applies as much as to the two others, and no more.

Well, then, is the fact of finding them in the usual place of deposit sufficient to justify their admission in evidence? If they were so found in the ordinary case of a man who was clearly competent to manage his own affairs, there could be no doubt that it would make them admissible. But if they are found there, and the finding of them is brought against him as proof of a charge made against him, his sanity must be proved, or not be disputed, before they could be made evidence against him. On that point the Lord Chief Justice and Mr. Justice Littledale, who are for letting in one of these letters, agree. They agree that the mere fact of finding them in the repository is not sufficient to let them in. But then the Lord Chief Justice thinks that this objection applies to two only, and not to the third letter. Now in what way do the circumstances of these letters differ from each other, so as to make the third alone admissible. It seems to me that the same circumstances are common to all three, namely, that they are all found in a particular place. On the day on which the third letter is dated, an indorsement is made on it by *Barrow*, Mr. *Marsden's* attorney, which shows that he had read the letter, and which is in compliance with the tenor of the letter. But there is not any evidence of Mr. *Marsden* having done anything with the letter. This evidence is not sufficient to justify its admission

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upon this inquiry, for this is not a question whether *Barrow* had read the letter, and was competent to act upon it, but whether what was done by him is so connected with *Marsden*, that your Lordships can treat his act as the act of *Marsden*, and so receive the letter in evidence as a proof of *Marsden's* competency. Do the circumstances of what *Barrow* did go beyond *Barrow* himself? Do they not stop with him, or are they connected in any way with *Marsden*? *Barrow* may have done all that is said; he may have acted under the letter by complying with all that is required in it (though the mere indorsement does not prove that), but does that in the least degree bring the letter home to *Marsden*? It does not. But then it is said, that the letter must have been sent by *Marsden* to *Barrow*. It is easy to jump over the difficulty that here presents itself, by saying that *Marsden* sent the letter. But where is the evidence of that? The indorsement proves that *Barrow* got it, but not that *Marsden* sent it. The question is what *Marsden* did, and the indorsement affords no evidence on that point. But then it is said, that after *Barrow* had it, this letter found its way back to *Marsden's* repository for letters, otherwise it could not be found there now. It is true that it got there, but how it did so is the question. Still I ask, if its being found in *Marsden's* repository is sufficient to admit it, how can you exclude the other two and yet admit this? I cannot conceive how a difference is to be made between them. I am, therefore, of opinion, that there is no proof which would justify the letting in of this letter, and that it must therefore follow the fate of the two others, and be rejected.

Then it is said, that in the Ecclesiastical Courts this evidence would be admissible. When that argument

was used, I could not help asking whether the question of what was admissible in the Common Law Courts was to be decided by what was admissible in the Courts Christian, and it was felt to be impossible to contend that such should be the rule. Indeed, if such could be the rule, we should admit what we certainly never do admit, evidence of hearsay three deep; as for instance, on the question of the force used by a husband in compelling a wife to make a will, the Court Christian lets in evidence to show the general treatment of the wife by the husband, in order to show that he does or does not generally exercise coercion over her. In the Court of Delegates we often start on our judicial inquiries with evidence of that sort. Besides, there is a very great difference between the Court Christian and the Courts of Common Law, the former having cognizance of the whole matter in dispute, and deciding not only on the admission and rejection of evidence, but on the import of it; in the latter, this is not the case. From the peculiarity of the tribunal of the Courts of Common Law have arisen nine parts out of ten of the peculiarities of our law of evidence. Here the principle of admissibility of evidence must be founded on the peculiarity of the tribunal to which it is tendered.

I fully agree with the observation of one of the learned Judges (Mr. Baron *Alderson*), when he says that if we come to one kind of evidence which more than any other is dangerous, it is evidence like this, for if once it goes to a jury, it is certain to have a great deal more weight with the jurymen than such evidence ought to have. This, therefore, would lead me rather to keep the door less than to hold it more open to the admissibility of such testimony. But I

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need not argue more upon this point, for unless the admissibility of this evidence stands upon common law rules, it must be rejected. My opinion is clear; but when any one sees a thing so clearly, and yet finds others, and persons of great ability and learning, differing from him, I think he is bound to take time to consider his own opinion, aided by the lights which their labours have thrown upon it.

Judgment postponed.

June 7.

Lord *Brougham*:—My Lords, I am now prepared to move the affirmance of the judgment of the Court below. I am perfectly satisfied that all the letters set forth in the bill of exceptions, and the admissibility of which formed the question on this appeal, were properly rejected at the trial as not admissible in evidence according to the rules which govern the reception of evidence in our courts of common law. I stated to your Lordships on a former day that that was my opinion, and that the only doubt I entertained, arose in consequence of the difference of opinion among the learned Judges who assisted your Lordships with their advice. Six of those learned Judges gave their opinions that all the letters were properly rejected, the six others giving a different opinion, but also differing among themselves; three of them being of opinion that all the letters were admissible, and three, that one only was admissible. I then stated, that it appeared to me there was no ground for any distinction between *Oliver Marton's* letter and the other two; that if the two letters were properly rejected,—as nine of the learned Judges agreed they were,—I did

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not see any ground of distinction between them and the third letter. But three of the learned Judges thought Mr. *Marton's* letter was distinguished from the other two by reason of the indorsement on it by Mr. *Barrow*, who had been Mr. *Marsden's* attorney at the time of its date. That indorsement, which was proved to be in the handwriting of Mr. *Barrow*, did not appear to me to form any ground of distinction; it rather tended to prove that Mr. *Marsden* had not seen that letter. The indorsement in the hand of a third person could not prove that Mr. *Marsden* acted on the letter, and without some act done by him in respect of it, all the Judges admitted that it could not be evidence of his competency, which was the matter in issue. In the next place it was quite clear that Mr. *Barrow* read that letter; he was Mr. *Marsden's* solicitor, and his indorsement on it did not prove that Mr. *Marsden* transmitted it to him, or read it, or ever saw it; and to infer from the indorsement that he communicated it to his attorney, was assuming the very fact which was required to be proved. Then there is a failure of proof of his having done any act in respect of that letter, showing his competency to make his will, and the three letters were alike inadmissible for that purpose. And even on the showing of the learned Judges in favour of this letter—Mr. *Marton's*—there is no ground for holding it more entitled to be admitted than the other two letters. I never saw a clearer case, or one calling for a more unhesitating expression of opinion, and I move accordingly, that the judgment of the Court of Exchequer Chamber be affirmed.

My noble and learned friend, Lord *Lyndhurst*, not having heard the arguments at your Lordships' Bar, declines to deliver any opinion on them; but

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having read the opinions of the learned Judges, he authorises me to say that he agrees with me, that the judgment of the Court below ought to be affirmed, as in accordance with the great principle of the rule of evidence in question.

Lord *Denman* :—I have not the advantage of having heard the arguments in this case at your Lordships' Bar, nor the opinions delivered to your Lordships by the learned Judges. But I heard the question of the admissibility of these letters argued in the Court of King's Bench two years ago. It would not be proper for me to enter into the case at any length, but I wish to state to your Lordships the opinion which I formed when the case was before the Court in which I have the honour to sit, and having carefully considered the judgments given by the Judges in the Exchequer Chamber since, I still adhere to the judgment of the Court of King's Bench. Supposing these letters were found and produced under circumstances free from all suspicion, and that they expressed the genuine opinions of the writers of them respecting the person to whom they were addressed, I continue to hold that that expression of opinion could not be admitted to prove the fact of his competency, and therefore, as declarations of opinion, they could not have the smallest influence on the question in issue. To infer, from the circumstances under which these letters were found, that the testator acted on them, we must first assume his competency, which is the matter to be proved. The tendering of the letters under these circumstances would rather make me jealous of extending the rules which guard the reception of evidence. The only question admitting of doubt is, whether the letter of Mr. *Marton* is

in a different situation from the other two. I could not see, after the most careful consideration, why a different rule of evidence should be applied to that letter. Had the testator himself indorsed it, that act might have proved the fact, for proof of which it was offered. But when I consider that the indorsement was not written by the testator, but by Mr. *Barrow*, his attorney, I do not understand how that indorsement could distinguish that letter from the others, so as to make it admissible to prove the testator's competency. There is no proof that he did any rational act in respect of that letter, unless we assume that his was the hand that wrote the indorsement, which is contrary to the evidence. I agree, therefore, with the opinion expressed by my noble and learned friend, that the judgment ought to be affirmed.

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The *Lord Chancellor* :—It was my duty to attend to the arguments in this case at the bar, and also to the opinions delivered by the learned Judges, to whom I listened with the utmost attention; and their statements, although not binding on your Lordships, are entitled to the greatest weight and respect. They all seemed to agree in one point, that the letters, taken as the mere declarations of the opinions of the writers of them, could not be evidence of the competency of the person to whom they were addressed. Some of the learned Judges say, all the letters ought to have been received in evidence, because there was sufficient proof, as they conceived, that the testator acted on them. There is no doubt, that if he had acted on them, they would be receivable at all events, whatever might be the effect of them on the jury. But the question is, whether he did or did not act on them. They were found, together with other letters,

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open in a cupboard under a bookcase, in the testator's private room, and one of them had an indorsement in the handwriting of Mr. *Barrow*, who was then the testator's solicitor. Three of the learned Judges were of opinion that this indorsement distinguished that letter from the other two, so as to render it admissible; three more thought all the letters admissible; while the other six thought none of them was receivable, because there was no proof that the testator acted on any of them; and with this conclusion I entirely concur, being, like them, of opinion that the testator did not act on any of the letters in such a way as would prove his competency to make his will. In order to introduce the letters, there must be some accompanying proof that he was engaged in the matters to which they referred. There was no such proof, nor was there any of the person by whom the seals were broken or the letters were placed in the cupboard, but it was desired to be inferred that they were placed there by the testator. If he had placed them there after opening and reading them, these acts would be valuable to a certain extent, as proof of his competency; but as there is no proof of his having so acted with regard to any of these letters, no inference can be drawn either in favour of his competency or against it. To infer these acts without proof would be assuming his competency, which is the very question in issue. One of the letters was indorsed by the testator's attorney; had it been indorsed by himself, it would be receivable; but from that act, done by the attorney, no inference can be drawn as to the testator's competency: it is an act not more consistent with his competency than it was with his incompetency. To infer without proof that he dealt with the letters, is to assume his

competency, which is the whole question. From the appearance of the letters no inference can be drawn whether he or another person had dealt with them. Mr. *Barrow*, whose indorsement was on the third letter, was as likely as the testator to be the person who opened it, and gave directions on it. You cannot assume that the testator dealt with these letters. It is allowed almost by all, that two of the letters are inadmissible. I think the third also inadmissible; and I agree that the judgment of the Court below ought to be affirmed.

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Affirmed accordingly.

(Lord Abinger did not take any part in the case. He had been counsel for the Defendant in Error from 1830 to 1835, at which latter period he was appointed Lord Chief Baron, and was created a peer.)



I N D E X.

ACCUMULATION.

A testator devised his freehold and copyhold estates, charged with annuities for his sons and daughter, upon trust, to invest and accumulate the surplus produce thereof for the benefit of his grandchildren, until the youngest should attain twenty-one, when the accumulations were to be divided among such of them as should be then living; and he directed that in case any of his sons and daughter should be living after the youngest of his grandchildren should have attained twenty-one, the residue of the said rents and profits should be further accumulated, and such accumulation divided among his grandchildren, who should be living at the death of the survivor of his sons and daughter; and charged, as aforesaid, he directed that after the death of such survivor his said estates should stand charged for twenty years with the payment of two third parts of the clear produce of them, in equal proportions of so much money as would in fifteen years make 30,000 £, which sum, with the interest thereof, he directed should be equally divided among all his grandchildren who should live to attain the age of twenty-one, their executors or administrators. The testator died in 1812, leaving ten grandchildren, nine of them children of one of the annuitants. All of them lived to attain twenty-one, the youngest having attained that age in 1830. The last survivor of the testator's sons and daughter died in 1831.

Held, that the charge of two-thirds of the produce of the estates was a provision for accumulation, within the Act 39 & 40 Geo. 3, c. 98, and therefore void, so far as it extended to any period after the expiration of 21 years from the testator's death.—*Evans v. Hellier*, p. 114.

AGENT. See DEVISE, 4.

ANNUITY. See DEVISE, 5. INCUMBRANCE.

APPEAL. See CORPORATION. PRACTICE.

BASTARDY. *See* LEGITIMACY.

BILL OF EXCEPTIONS. *See* PRACTICE, 3.

BILLS OF EXCHANGE. *See* FOREIGN LAW.

Where bills were drawn and accepted, and became due in France, but the acceptor, a Scotchman, before such bills became due, returned to Scotland, and there continued till his death, held, by the Lords, reversing the decision of the Court of Session, that more than six years having elapsed between the time of the bills becoming due and the action being brought, the Scotch law of prescription applied, and that its effect was not prevented by the fact that the payee had taken legal proceedings in France during the absence of the debtor, and had obtained judgment against him.—*Don v. Lippmann*, p. 1.

CHARITY. *See* DEVISE, 2.

CONTRACT. *See* MARRIAGE CONTRACT.

CORPORATION. *See* PRACTICE.

1. A summons of declarator charged the Lord Provost, magistrates, and town council of Glasgow, with the breach of an agreement entered into by their predecessors with regard to the administration of a trust fund; and prayed “that the said Lord Provost, magistrates, and council, and *A. B. C. D. &c.*,” reciting the name of every one of them—“for themselves, and as representing the burgh and community of Glasgow, ought to be decerned.” The Court of Session pronounced an interlocutor, decerning “against the defenders in terms of the conclusion of the libel,” declaring them liable in expenses, and specially directing that no part of the expense of this litigation should form a charge on the trust fund. Held, that the interlocutor thus appearing to affect the interests of each individual member of the corporation, any one member was by law entitled to appeal against it.—*Gray v. Forbes*, p. 357.
2. The lists of persons qualified to elect or be elected to municipal offices in the burghs of Scotland, must be made up on the 16th of September in each year by the town-clerk of each burgh, in conformity with the sheriffs’ lists of parliamentary voters for such burghs.—*Monteith v. M’Gavin*, p. 409.
3. The town clerk has no authority to alter the burgh lists then made up, even upon intimation that the sheriffs’ lists had been subsequently altered by the Court of Review, but such

borough lists must remain until the 16th of September in the following year, and then be altered in conformity with the then existing parliamentary lists for the burgh.—*Monteith v. M'Gavin*, p. 409.

Where, therefore, a person's name stood on the sheriffs' list on the 16th of September, and was transferred by the town clerk to the burgh list on that day, such person was entitled to elect and be elected to a municipal office in virtue of so appearing on the burgh lists, though before the period of the municipal elections his name had been, by the decision of the Court of Review, removed from the parliamentary lists made up by the sheriff.

Qu.? Whether in such a case his right to elect or be elected can properly be discussed in the courts of Scotland by a bill of suspension and interdict.—*Monteith v. M'Gavin*, p. 409.

COSTS.

1. Where a trust disposition was obscurely worded, and the residue was very much larger than the disponent expected, the Lords ordered that the costs of all the parties should be paid out of such residue, *Miller v. Roman*, p. 99.
2. In a case in which the question was as to the words of a will creating a trust for the benefit of B. E. L., or being merely words recommendatory of him to the office of agent to W. S., who was to take the estate. Held that, as this case might have been discussed on demurrer without any inquiry into the fitness of B. E. L. for the situation of agent, the costs incurred by an inquiry of that sort in the Court below had been needlessly incurred, and should not be paid by B. E. L. to W. S., but that each party should in that respect bear his own costs.—*Shaw v. Lawless*, p. 129.
3. Costs are not given where an interlocutor is only varied.—*Taylor v. Hossack*, p. 380.

DESCENT OF HONORS. *See* PEERAGE.

DEVISE. *See* COSTS.

1. A. B., by trust deed of settlement, gave all his estate, real and personal, to trustees, with power to keep up the trust by assumption of new trustees; and he directed them to put out on security 2,000 £, and pay the interest to M. M. for her life, the said sum itself payable to the trustees on her death, and he directed them to apply the residue of his estate to such benevolent and charitable purposes as

they should think proper; and if the same should amount to 600 l. or upwards, he recommended to his said trustees and their foresaids, to vest the same in themselves, and apply the proceeds in yearly payments to faithful domestic servants settled in Glasgow. And if the residue should not amount to 600 l., he authorized his said trustees to distribute the same to such charitable and benevolent purposes as they should think proper. The residue was found to amount to 12,000 l. Held, first, that the words "the said sum itself payable to the trustees on her (M. M.'s) death," did not give the 2,000 l. to them beneficially, but it became part of the general estate; secondly, that the bequest of the residue was not void for uncertainty; and, thirdly, that the costs of all the parties ought to be paid out of the residue, as the instrument was obscurely worded, and the residue was so much larger than the disponent expected.—*Miller v. Rowan*, p. 99.

2. A direction by a testator to his trustees to apply the residue of his personal estate to and for such benevolent, charitable, and religious purposes as they in their discretion should think most advantageous and beneficial, and for no other use, intent, or purpose, held void for uncertainty.—*Williams v. Kershaw*, p. 111, n.
3. A testator devised his freehold and copyhold estates, charged with annuities for his sons and daughter, upon trust, to invest and accumulate the surplus produce thereof for the benefit of his grandchildren, until the youngest should attain twenty-one, when the accumulations were to be divided among such of them as should be then living; and he directed that in case any of his sons and daughter should be living after the youngest of his grandchildren should have attained twenty-one, the residue of the said rents and profits should be further accumulated, and such accumulation divided among his grandchildren, who should be living at the death of the survivor of his sons and daughter; and charged, as aforesaid, he directed that after the death of such survivor his said estates should stand charged for twenty years with the payment of two third parts of the clear produce of them, in equal proportions of so much money as would in fifteen years make 30,000 l., which sum, with the interest thereof, he directed should be equally divided among all his grandchildren who should live to attain the age of twenty-one, their executors or admini-

strators. The testator died in 1812, leaving ten grandchildren, nine of them children of one of the annuitants. All of them lived to attain twenty-one, the youngest having attained that age in 1830. The last survivor of the testator's sons and daughter died in 1831.

Held, that the charge of two-thirds of the produce of the estates was a provision for accumulation, within the Act 39 & 40 Geo. 3, c. 98, and therefore void, so far as it extended to any period after the expiration of 21 years from the testator's death.—*Evans v. Hellier*, p. 114.

4. A testator devised certain real estates to trustees for the use of *W. S.* for life, with remainders over, and he directed the residue of his personal estate to be invested in the purchase of other real estates. The will then contained this proviso: "And it is also my particular desire that my said executors, whilst acting in the management of all or any of my affairs under this my will, as also my friend *W. S.* when he shall enter into the receipt and perception of my said rents of *K. V.* and *K.*, shall continue the said *B. E. L.* in the receipt and management thereof, and likewise shall employ and retain him in the receipt, agency, and management of the rents and issues of such other lands and premises as shall and may be purchased and settled in pursuance of the directions hereinbefore contained, at the usual fees allowed to agents, he having acted for me since I became possessed of said estates fully to my satisfaction." Held, by the House of Lords, reversing the judgment of the Court below, that these words did not create a trust in favour of *B. E. L.*—*Shaw v. Lawless*, p. 129.
5. *D.*, by indenture, in 1799, demised all his estates in *Ireland*, of which he was seised for life, to trustees for 99 years, on trust to pay him an annuity of 10,000 *l.*, and to apply the residue of the rents and profits in payment of his debts. He soon after received the rents to his own use, excluding the trustees' receiver; and in 1819 he joined his eldest son *B.*, the tenant in tail, in suffering recoveries of the estates, which, by a deed executed by them in 1822, were limited to trustees, among other trusts, to pay *B.* two annuities of 5,000 *l.* and 1,000 *l.* during *D.*'s life, with power to *D.* to charge the estates with 217,000 *l.*, and power to *B.* to charge them with 100,000 *l.* to be raised after *D.*'s death. *B.* assigned his annuities, and charge of 100,000 *l.*, to *W.*

to secure the repayment of monies advanced. In 1835, *W.* filed a bill in *Ireland* against *D.* and *B.* and others for enforcing these securities. Some of *D.*'s creditors, who, in a suit instituted there in 1828, had obtained the benefit of a suit pending in *England* against him and the trustees of the deed of 1799 for carrying the trusts thereof into execution, and a receiver over the trust estates, being made defendants to *W.*'s bill, claimed by their answer to be first incumbrancers on *D.*'s annuity of 10,000 *l.* to the amount of the rents received by him above that sum, in breach of the trusts of the deed of 1799.

Held, that as *D.*'s creditors in their suit never sought to attach his annuity before he granted the annuities out of it to *B.*, but confined their proceedings to the carrying of the trusts of the deed of 1799 into execution, *B.* being no party to them, was by the deed of 1822 a purchaser for valuable consideration, without notice; that his two annuities were well charged on *D.*'s annuity of 10,000 *l.*; and *W.*, as *B.*'s assignee, was a prior incumbrancer on it.—*Houlditch v. Wallace*, p. 629.

EVIDENCE.

In a claim of peerage, where there is no patent of creation or enrolment of such patent, and the contemporaneous Lords' Journals are not in existence, an old M.S. book, purporting to be copied from the Journals by an officer whose duty it was to prepare lists of peers present and absent, will be received as evidence of a Peer sitting in Parliament.

A return to a royal commission, not signed nor sealed by the commissioners, is not admissible to prove any matter therein stated.

A pedigree made by a person with a view to a suit respecting property is not receivable in a claim of peerage by his son to prove his descent; nor is a case stated for the opinion of counsel produced from the family papers of a distant relation of the claimant.

Entries in a family missal are admitted as evidence of births, deaths and marriages of members of the family, just like similar entries in a family Bible.

To make a copy of a record admissible in evidence, it is not enough that it was held by a witness while another read

the original to him. There must be a change of hands, or the witness must himself read the copy with the original.
—*Slane Peerage*, p. 24.

The statements of chroniclers or contemporary historians are not admissible as evidence of the creation of a peerage.

The admission of an inscription in a churchyard by a former Committee of Privileges, does not make a copy from their minutes necessarily admissible in another case. A paper writing found among an ancestor's papers, in the custody of a stranger in blood, and not signed by the ancestor, nor by any of his family, is not admissible to show the state of the family.

A manuscript book, intitled, "Funeral Certificates of the Nobility," produced from the Heralds' College, is admissible evidence of the state of the deceased's family, and other statements contained in it.—*The Vaux Peerage*, p. 526.

A monumental inscription admitted in one case is not as of course admissible in another.—*Id.* 541.

On a question of the competency of a party to make a will, letters written to that party by third persons since deceased, and found (many years after their date) among his papers, are not admissible in evidence, without proof that he himself acted upon them.—*Wright v. Tatham*, p. 670.

FOREIGN LAW.

The law of a country, where a contract is to be enforced, must govern the enforcement of such contract.

Where, therefore, bills were drawn and accepted, and became due in France, but the acceptor, a Scotchman, before such bills became due, returned to Scotland, and there continued till his death; held, by the Lords, reversing the decision of the Court of Session, that more than six years having elapsed between the time of the bills becoming due and the action being brought, the Scotch law of prescription applied, and that its effect was not prevented by the fact that the payee had taken legal proceedings in France during the absence of the debtor, and had obtained judgment against him.

A Court which is called on to enforce a foreign judgment may examine into that judgment to see whether it has been rightfully obtained or not.—*Don v. Lippman*, p. 1.

HONORS. *See* EVIDENCE. PEERAGE.

INCUMBRANCER.

D., by indenture, in 1799, demised all his estates in *Ireland*, of which he was seised for life, to trustees for 99 years, on trust to pay him an annuity of 10,000 *l.*, and to apply the residue of the rents and profits in payment of his debts. He soon after received the rents to his own use, excluding the trustees' receiver; and in 1819 he joined his eldest son *B.*, the tenant in tail, in suffering recoveries of the estates, which, by a deed executed by them in 1822, were limited to trustees, among other trusts, to pay *B.* two annuities of 5,000 *l.* and 1,000 *l.* during *D.*'s life, with power to *D.* to charge the estates with 217,000 *l.*, and power to *B.* to charge them with 100,000 *l.* to be raised after *D.*'s death. *B.* assigned his annuities and charge of 100,000 *l.* to *W.* to secure the repayment of monies advanced. In 1835, *W.* filed a bill in *Ireland* against *D.* and *B.* and others, for enforcing these securities. Some of *D.*'s creditors, who, in a suit instituted in 1828, had obtained the benefit of a suit pending in *England* against him, and the trustees of the deed of 1799 for carrying the trusts thereof into execution, and the appointment of a receiver over the trust estates, being made defendants to *W.*'s bill, claimed by their answer to be first incumbrancers on *D.*'s annuity of 10,000 *l.* to the amount of the rents received by him above that sum, in breach of the trusts of the deed of 1799.

Held, that as the creditors of *D.*, in their suit, never sought to attach his annuity before he granted the annuities out of it to *B.*, but confined their proceedings to the carrying of the trusts of the deed of 1799 into execution, *B.* being no party to them, was by the deed of 1822 a purchaser for valuable consideration, without notice; that his two annuities were well charged on *D.*'s annuity of 10,000 *l.*, and *W.*, as *B.*'s assignee, was a prior incumbrancer on it.—*Houlditch v. Wallace*, p. 629.

INTEREST ON JUDGMENT.

On a judgment affirmed on writ of error, the House of Lords gives interest from the day of its affirmance by the Exchequer Chamber, pursuant to the provisions of the statute 3 & 4 Will. 4, c. 42, s. 30.—*Garland v. Carlisle*, p. 354.

LEGITIMACY.

Husband and wife, after living together for ten years, and

having one child, agreed to separate. They accordingly afterwards lived apart, but within such distance as afforded them opportunities of sexual intercourse, the husband not being impotent. Held, that the presumption of law in favour of the legitimacy of a child begotten and born of the wife during the separation, may be rebutted, not only by evidence to show that the husband had not sexual intercourse with her, but also by evidence of their conduct, such as that the wife was living in adultery, that she concealed the birth of the child from the husband, and declared to him that she never had such child; that the husband disclaimed all knowledge of the child, and acted, up to his death, as if no such child was in existence; and also, that the wife's paramour aided in concealing the child, reared and educated it as his own, and left it all his property by his will.—*Morris v. Davies*, p. 163.

LIMITATIONS, STATUTE OF. See FOREIGN LAW.

MARRIAGE CONTRACT.

In a marriage contract, the husband covenanted to secure to his intended wife the benefit of the pension or annuity payable from a certain fund to the widow of a subscriber, "and failing thereof, or in case the said pension or annuity, from whatever cause, shall not be available to his promised wife, excepting only through her right to and possession of property producing the amount of the pension, he bound himself, his executors," &c. to make payment to her of a clear yearly annuity equal to the pension. At the time of his death he had secured his wife a pension on the Bombay Military Fund to the amount of 365 *l.* a year. From different causes (other than her possession of property producing the amount of the pension) the payment of the pension was at first reduced, and afterwards stopped. Held that the contract was an absolute contract to make good the amount of the pension in every case but that of the possession of property producing a similar amount, and that event not having happened, the husband's estate was declared liable.—*Taylor v. Hossack*, p. 380.

PATENT. See PEERAGE.

PEERAGE. See EVIDENCE. PRACTICE.

1. *B.* claiming, of right, to be Lord Baron of Slane, in the peerage of Ireland, as heir general of the last Lord Slane,

and alleging that the same was a barony in fee, showed by his statement and proofs, that from the first creation of a peerage in his ancestors to the year 1597, four such peers, dying at various periods without issue male, but leaving daughters or sisters, were severally succeeded in the dignity by the heirs male, uncles or cousins, who were in possession of the family estates. The claimant further showed that a Lord Baron of Slane, whom he alleged to be the last peer of the family, and of whom he stated himself to be sole heir general, left a daughter, an only child, who long survived him, but did not claim the peerage, and also two sisters, the elder of whom he stated to have died without issue, and from the younger the claimant derived his descent as her sole heir. Held that the claimant, though he might be heir general, had failed to make out his claim to the dignity, as it appeared by his own statement to have gone uniformly to the heirs male in exclusion of the heirs female, who had never made claim to it.—*Slane Peerage*, p. 23.

2. Upon a claim to a Scotch peerage, where no patent of creation can be found, but it appears from the records of the Parliament that the ancestor from whom the dignity is alleged to have descended sat in Parliament, an original instrument, purporting to be under the great seal of Scotland, and produced from the repositories of the heir of entail of the family estates, will be received as evidence of the creation of such peer, with a limitation to him and his heirs male therein stated.—*The Huntly Peerage*, p. 349.
3. If a claimant omit to give evidence of the creation and limitation of one of several dignities to which he states in his petition that he is of right entitled, the Committee for Privileges will not report that he has made good his claim to that dignity, on the presumption that it descended from the same ancestor with the other dignities to which the claimant has proved his right.—*Id. Ibid.*
4. In a claim of peerage, it is not sufficient, in the petition to the Crown, to state that the claimant is of right entitled to the dignity, but the petition should pray that the claimant may be declared so entitled, and the Committee for Privileges or the House has no power to supply the defect of the prayer, but it will be necessary for claimant to present an amended petition to the Crown.—*Id. Ibid.*

5. ON a claim by coheirs to the dignity of a Baron, created in the reign of *H.* 8, and in abeyance from the reign of *Car.* 2, they proved that their ancestor sat among the Peers in Parliament in the 25th of *H.* 8.; that he was duly summoned to and sat in the Parliament of the 28th of *H.* 8, and that he and his heirs male—who were also his heirs general—were summoned to and sat in several succeeding Parliaments, by the style and title of Lord *Vaux*. To account for the want of evidence of a writ of summons prior to the sitting in the 25th of *H.* 8, they showed that there were no Lords' Journals extant from the 7th to the 25th of *H.* 8; that the enrolments of writs during that period were very imperfect; and that, although the Patent Rolls were complete, no patent or charter of creation of a barony of *Vaux*, nor any record or trace of such patent, was discovered, after the most diligent searches in all the offices for records. Held that the barony of *Vaux* was created by writ of summons and sitting in Parliament, and was therefore descendible to heirs general.—*The Vaux Peerage*, p. 526.

PLEADING. See CORPORATION, 1.

PRACTICE. See COSTS. INTEREST ON JUDGMENT. PEERAGE, 3, 4.

1. *F.*, whose petition to the King claiming the barony of Slane as heir male was referred to the Attorney-general, but no report made thereon, was, upon petition to the House of Lords, and a statement by the Attorney-general to the Committee of Privileges, admitted to appear by his counsel and agents to oppose *B.*'s claim.—*Slane Peerage*, p. 23.
2. If in a claim of peerage, an important question of law arises, the Committee will depart from the ordinary rule, and hear two counsel on each side.—*Id. Ibid.*
3. A Bill of Exceptions tendered to the direction given by the Judge to the jury, set forth the pleadings and evidence, and then referred to a lease, part of which was inserted by way of extract. The judgment of the Court on the Bill of Exceptions having been brought up by Writ of Error to this House, the counsel for the Plaintiff in Error proposed to read a part of the lease not extracted into the Bill of Exceptions. Held, that they were not at liberty to do so.—*Galwey v. Baker*, p. 157.

4. On a motion in the Court of Chancery for a new trial of an issue, the parties by their counsel consented to take the Lord Chancellor's decree, on the evidence taken on the former trials, in order to avoid further expense and delay. Held, that such decree was subject to appeal to this House.—*Morris v. Davies*, p. 168.
5. Where *A.* presents a petition of appeal, and *B.* presents a counter petition, praying that the former may be dismissed as incompetent, *B.* is entitled to begin on the argument as to the competency of the appeal.—*Gray v. Forbes*, p. 357.
6. Where there are several coheirs to a dignity, and some only claim it, they must give notice to the others.—*Vaur Peerage*, p. 626.

SET OFF. *See* TRUST DEED.

TRUST. *See* CORPORATION. DEVISE.

WILL. *See* DEVISE.

WITNESS. *See* EVIDENCE.

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